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In The
Supreme Court of the United States

FLORIDA ASSOCIATION OF PROFESSIONAL LOBBYISTS, INC., a Florida Not for Profit Corporation; GUY M. SPEARMAN, III, a Natural Person; SPEARMAN MANAGEMENT COMPANY, a Florida Corporation; RONALD L. BOOK, a Natural Person; RONALD L. BOOK, P.A., a Florida Professional Association,

Petitioners,

VS.

DIVISION OF LEGISLATIVE INFORMATION SERVICES OF THE FLORIDA OFFICE OF LEGISLATIVE SERVICES, a Florida State Agency; THE FLORIDA COMMISSION ON ETHICS, an Independent Constitutional Commission; JEFF ATWATER, as President of the Florida Senate; and LARRY CRETUL, as Speaker of the Florida House of Representatives,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents the following questions which are closely related to the questions now before this Court in *Citizens United v. Federal Elections Commission*, No. 08-205:

1. Whether a state law that requires disclosure of the identities of those paying for grassroots lobbying – "opinion articles, issue advertisements, and letter writing campaigns" – facially violates the First and Fourteenth Amendments due to vagueness and overbreadth.

2. Whether a state law that prohibits all gifts for the purpose of lobbying facially violates the First and Fourteenth Amendments due to vagueness and overbreadth.

PARTIES TO THE PROCEEDING & CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption. None has a parent corporation and no publicly held company owns stock in any of the entities.

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INTRODUCTION

This case presents an important issue that was left open by the majority in *United States v. Harriss*, 347 U.S. 612 (1954), and that has vexed lower courts ever since: whether imposition of a disclosure requirement on "indirect lobbying" – often referred to as "grassroots lobbying" – facially violates the First and Fourteenth Amendments. It also seeks review of a total prohibition on lobbyists' gifts to public officials.

In 2005, the Florida Legislature enacted what may be the strictest regulation of state lobbyists in the country. One feature of the law requires all persons and entities who are paid to write opinion articles, publish issue advertisements, and engage in other forms of indirect lobbying for legislative change or other government action to register as lobbyists and to disclose the identity of all persons and entities who paid them to engage in such activities as well as the amounts they were paid. Another feature of the law prohibits the giving of any gift "directly or indirectly" to state legislators and other officials for the purpose of lobbying.

The legislature imposed these strict requirements and the courts below upheld them without *any* evidence that they were necessary to prevent corruption of legislative or executive government functions and notwithstanding the historically-recognized threat that such restrictions pose to the press and to pure issue advocacy groups such as pro-life, civil rights, right to work, and religious organizations.

Such restrictions, like restrictions on the right of corporations to engage in pure issue advocacy in political campaigns, are void for vagueness and facially overbroad. They violate the First Amendment by sweeping far too much protected speech within their ambit without any proof that they are necessary to advance the legitimate governmental interests they may serve.

CITATIONS OF OPINIONS & ORDERS IN THE CASE

Florida Association of Professional Lobbyists, Inc. v. Division of Legislative Information Services, 566 F.3d 1281 (11th Cir. 2009) (hereinafter "FAPL v. DLIS") (final judgment affirming summary judgment for defendants). (App. 1).

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FAPL v. DLIS, 431 F. Supp. 2d 1228 (N.D. Fla. 2006) (preliminary injunction denial). (App. 46).

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued a final judgment in this case May 7, 2009. (App. 1). This court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

The First Amendment to the Constitution of the United States is reproduced in the appendix. (App. 64).

The complete Florida Statute provisions at issue are reproduced in the appendix. (App. 65-98). Section 11.045 governs lobbying of the legislature. Section 112.3215 governs lobbying of the executive branch.

Both sections require lobbyists to register, to identify each principal, and to file quarterly reports showing the compensation provided or owed by each principal to a lobbyist. Fla. Stat. §§ 11.045(2)-(3) & 112.3215(3)-(5). (App. 66-72 & 87-92). The disclosure provisions apply to "grassroots" or "indirect" lobbying by defining "lobbying" and "lobbies" as "influencing or attempting to influence" legislative or executive action or nonaction through "oral or written communication or an attempt to obtain the goodwill of" a legislator or other state official. Fla. Stat. §§ 11.045(1)(f) & 112.3215(f). (App. 82 & 85).

Both also prohibit gifts from being given "directly or indirectly" to legislators and other state officials "for the purpose of lobbying." Fla. Stat. § 11.045(4)(a) & § 112.3215(6)(a). (App. 72 & 92).

STATEMENT OF THE CASE

Plaintiffs, a not for profit corporation representing professional Florida lobbyists, two individual lobbyists, and two lobbying firms, filed suit seeking invalidation of chapter 359, Laws of Florida (2005) ("the Act"), as violating the First and Fourteenth Amendments of the United States Constitution as well as provisions of the Florida Constitution. (App. 33). The district court denied a motion for preliminary injunction, *FAPL v. DLIS,* 431 F. Supp. 2d 1228 (N.D. Fla. 2006) (App. 46), and then later entered final summary judgment against all claims. *FAPL v. DLIS,* No. 4:06cv123-SPM/WCS, 2006 WL 3826985 (N.D. Fla. Dec. 28, 2006). (App. 32 & 99).

The Eleventh Circuit affirmed the summary judgment against the federal claims and certified the state law claims to the Florida Supreme Court. *FAPL v. DLIS,* 525 F.3d 1073 (11th Cir. 2008). (App. 3). The Florida Supreme Court opined that the law did not violate the Florida Constitution. *FAPL v. DLIS,* No. SC08-791, 7 So. 3d 511 (Fla. 2008). (App. 19). The Eleventh Circuit then affirmed all aspects of the district court's final summary judgment. *FAPL v. DLIS,* 566 F.3d 1281 (11th Cir. 2009). (App. 1).

Factual Background

At a special session in December 2005, the Florida Legislature passed the Act, now codified at section 11.045, Florida Statutes, relating to lobbying the Florida Legislature, and section 112.3215, Florida Statutes, relating to lobbying Florida executive agencies. (App. 65-98).

The Act imposes a disclosure provision that requires lobbying firms to file quarterly statements reporting the total compensation paid or owed by their "principals" – that is, their clients. Fla. Stat. §§ 11.045(3)(a)1.c, 112.3215(5)(a)1.c. Lobbying firms must also disclose the full name, business address, and telephone number of each principal, as well as the total compensation that each principal paid or owed to the lobbying firm. Fla. Stat. §§ 11.045(3)(a), 112.3215(5)(a). (App. 68 & 88).

The Act also prohibits gifts. Section 11.045(4)(a) provides "no lobbyist or principal shall make, directly or indirectly, and no member or employee of the legislature," nor any "agency official, member, or employee shall knowingly accept, directly or indirectly, any expenditure." Section 112.3215(6)(a) similarly states "no lobbyist or principal shall make, directly or indirectly, and no agency official, member, or employee shall knowingly accept, directly or indirectly, any expenditure." (App. 72 & 92).

The term "expenditure" is defined as "a payment, distribution, loan, advance, re-imbursement, deposit, or anything of value made by a lobbyist or principal

for the purpose of lobbying," Fla. Stat. §§ 11.045(1)(d) & 112.3215(1)(d). (App. 65 & 84).

"Lobbying" is defined as "influencing or attempting to influence legislative action or nonaction through oral or written communication or an attempt to obtain the goodwill of a member or employee of the Legislature." Fla. Stat. § 11.045(1)(f). (App. 66). "Lobbies" is defined similarly to mean "seeking, on behalf of another person, to influence an agency with respect to a decision of the agency in the area of policy or procurement or an attempt to obtain the goodwill of an agency official or employee." Fla. Stat. § 112.3215(f). (App. 85). Nothing restricts the applicability of the law to direct lobbying.

The Act has enforcement provisions that allow for audits as well as for the filing of sworn complaints. Fla. Stat. §§ 11.045(7)-(8), 112.3215(8)-(10). (App. 74 & 93). Penalties related to legislative lobbying include "a fine of not more than $5,000, reprimand, censure, probation, or prohibition from lobbying for a period of time not to exceed 24 months." Fla. Stat. § 11.045(7). (App. 74). For executive lobbying, penalties similarly include reprimand, censure, or a prohibition on lobbying any agency for a period not to exceed two years, and "a fine of not more than $5,000." Fla. Stat. § 112.3215(10). (App. 95).

The plaintiffs are lobbyists, lobbying firms, and a not for profit corporation that represents professional lobbyists. The plaintiffs use a variety of techniques in attempting to influence legislative and executive

action, including both direct lobbying and indirect lobbying by conducting surveys of voter opinion and publishing such information; organizing citizen rallies and demonstrations; publishing newsletters, faxes and e-mails to association members; publication of paid advertising; publication of opinion columns in newspapers; giving interviews to radio and television journalists; presentation of awards to legislators and other public officials to provide recognition and express appreciation; rating public officials in accordance with their support or non-support for their activity in a field of special interest to the plaintiffs or their clients and publication of such ratings; and conducting research in order to gain information, develop strategy and develop support. (Plante Dec. ¶ 11).

The plaintiffs filed suit in part because they believed that the disclosures required by the law would create dangers for themselves, their employees, and their family members that would not otherwise exist and deter their clients from continuing to engage their services. (Book Dec. ¶ 14).

Plaintiff Kenneth A. Plante, founder and chair of FAPL and a lobbyist with 27 years of experience in Florida, testified that "The compensation that a principal pays to a lobbying firm for the services of a lobbyist typically reflects significant confidential information that the principal shares with the lobbyist." (Plante Dec. ¶ 20). He explained that "The amount of compensation typically reflects the value that the principal places on the lobbyists' services, the

importance that the principal places on the assignment given to the lobbyist, the lobbyists' personal beliefs regarding the compensation that the principal should pay for the lobbyist's services, and the compensation that the individual lobbyist will receive from the lobbying firm." (Plante Dec. ¶ 20).

Prior to the enactment of the law, the plainitffs maintained the confidentiality of compensation paid to them by their clients. Two of the plaintiffs, Ronald L. Book and Guy M. Spearman, III, explained the confidentiality protects their families "from being targeted by criminals who may become aware of my compensation." (Book Dec. ¶ 14.1a., Spearman Dec. ¶ 10.a.). They further explained that they charge some clients low rates because they are pursuing "causes that I find admirable or that I believe serve charitable purposes" and that prior to the passage of the act, they did not disclose compensation arrangements with some of these clients because they "do not wish to reveal to the world that [they] share their values." (Book Dec. ¶ 15). "Revealing my fee arrangements with each client would reveal much about my own personal viewpoints, associations, and values that I do not wish to make public." (Book Dec. ¶ 15; Spearman ¶ 11).

Proceedings in the District Court

In the district court, plaintiffs sought a pre-enforcement declaration that the Act was facially

unconstitutional. They also sought preliminary and permanent injunctions against the Act's enforcement. *See FAPL*, 431 F. Supp. 2d 1228. (App. 46).

Plaintiffs argued that the Act was invalid because it had not been read three times after it was introduced in the Florida House of Representatives. They argued that the Act infringed upon the Florida Supreme Court's authority to regulate the practice of law; and they argued that the Act contravened Florida's separation of powers doctrine. *Id.* at 1232. (App. 7).

Plaintiffs also argued that the Act's expenditure restrictions, disclosure requirements, and enforcement provisions violated their rights to free speech, due process, equal protection, and privacy under both the United States and Florida Constitutions. *Id.* (App. 7).

The district court denied plaintiffs' motions for preliminary injunction and summary judgment, concluding that plaintiffs were unlikely to succeed on their claims. The district court then granted summary judgment for the defendants on all of plaintiffs' claims. *Id.* at 1237. (App. 7).

The Eleventh Circuit's Disposition of the Federal Issues

Plaintiffs contended that the Act's provisions banning expenditures as well as its compensation reporting provisions are unconstitutionally vague and

overbroad because statutory terms such as "expenditure" or "direct" and "indirect" are so inadequately defined that a person of common intelligence must guess at their meaning and that, as a result, the Act allows for unbridled discretion in its enforcement. *FAPL,* 525 F.3d at 1078. (App. 12).

The Eleventh Circuit held in reliance on *Grayned v. City of Rockford*, 408 U.S. 104 (1972), that to overcome a vagueness challenge, a statute must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited; and it must provide explicit standards for those who apply them to avoid arbitrary and discriminatory enforcement. *FAPL,* 525 F.3d at 1078. (App. 12-13).

The Eleventh Circuit held that the Act did not violate due process standards for vagueness because it "clearly provides that an expenditure – which is separately defined in sections 11.045(1)(d) and 112.3215(1)(d) – is unlawful only if it is made by a lobbyist or principal and accepted by a government official." *Id.* (App. 13). The court rejected plaintiffs' contention that the Act could be read to bar *all* expenditures for lobbying purposes such as a cab fare to the capitol. *Id.* at 1078-79. (App. 13). The court held that the law only bars those lobbying expenditures that are accepted by a government official. *Id.* at 1079. (App. 13).

The Eleventh Circuit also held that it did not "regard the term 'indirect' as vague: a person of common intelligence would understand that it applies

to expenditures or compensation paid through a third party." *Id.* (App. 13).

Examining plaintiffs' argument that the Act's compensation reporting provision requires "'disclosure of compensation paid to a lobbyist even where that compensation has *not* been paid for expressly advocating passage or defeat of legislation,'" *id.* at 1079 (emphasis added), the Eleventh Circuit turned to the overbreadth principles enunciated in *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *United States v. Salerno*, 481 U.S. 739 (1987); and *Virginia v. Hicks*, 539 U.S. 113 (2003). The court noted that the overbreadth doctrine is strong medicine that should be used sparingly and only as a last resort; that generally a facial challenge must show that no set of circumstances exists under which the challenged act would be valid; and that an exception to this doctrine requires facial invalidation of a law that does not aim specifically at evils within the allowable area of state control but sweeps within its ambit a substantial amount of protected speech, judged in relation to the statute's plainly legitimate sweep. *FAPL*, 525 F.3d at 1079. (App. 14-15).

Applying these principles, the Eleventh Circuit began with recognition of the extraordinary breadth of the law. It agreed with the plaintiffs that "lobbying activity, as defined in the Act, encompasses not only direct communications from lobbyists to legislators and state officials (which is undoubtedly a legitimate object of regulation), but also indirect communications – such as opinion articles, issue advertisements,

and letterwriting campaigns-from lobbyists on behalf of their clients to the press and public at large for the purpose of influencing legislation or policy." *Id.* at 1080 (footnote omitted). (App. 15-16). Nevertheless, the court upheld the Act on the theory that "the state has a compelling interest 'in "self-protection" in the face of coordinated pressure campaigns' directed by lobbyists," citing its prior decision in *Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460, 461 (11th Cir. 1996). *FAPL*, 525 F.3d at 1080 (quoting *Meggs*, 87 F.3d at 460). (App. 16).

Applying strict scrutiny, the Eleventh Circuit stated that this interest is "compelling not only when the pressures to be evaluated by voters and office-holders are 'direct,' but also when they are 'indirect.'" *Id.* (App. 16-17). The Eleventh Circuit cited *Minnesota State Ethical Practices Board v. National Rifle Association of America*, 761 F.2d 509, 511-13 (8th Cir. 1985), as an example of a case upholding a state's interest in applying its reporting requirements to *indirect* communications between a lobbyist and members of an association for the purpose of influencing specific legislation. (App. 17).

The Elevent Circuit certified all state law issues to the Florida Supreme Court. (App. 4).

The Florida Supreme Court's Disposition of the State Issues

The Florida Supreme Court held that the Act did not violate the separation of powers doctrine, that the Act was validly enacted, and that the Act did not infringe on the Supreme Court's exclusive jurisdiction to regulate lawyers or the practice of law. (App. 19).

The Eleventh Circuit's Final Judgment

After obtaining the Florida Supreme Court's answer to the certified question, the Eleventh Circuit affirmed the district court's final summary judgment. (App. 1).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Will be Undermined by a Decision in *Citizens United v. FEC* Facially Invalidating BCRA Section 203

If the Court overturns *Austin* and *McConnell*, in *Citizens United*, this would undermine the Eleventh Circuit's decision to uphold both the disclosure requirement applicable to grassroots lobbying and the wholesale prohibition of direct and indirect gifts.

A. The Ruling on the Disclosure Requirement for Grassroots Lobbying Will be Undermined

In *United States v. Harriss*, 347 U.S. 612 (1954), the Court upheld the facial constitutionality of a federal law that imposed disclosure requirements on direct lobbying of members of Congress, but the *Harriss* majority avoided deciding the facial constitutionality of imposing the same requirements on "indirect lobbying" – sometimes referred to as "grassroots lobbying." It did so by construing the law at issue as applicable solely to direct, face-to-face lobbying of Congress and to direct letter writing to Congress. The majority's construction of the statute was motivated by concerns that the statute, unless narrowed, would be facially invalid.[1] The three dissenters in *Harriss* concluded the law could not be narrowed and that the federal law must therefore be

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[1] More recently, the Court has saved other federal statutes regulating political speech from invalidation by construing them narrowly as well. *See, e.g., McConnell v. Federal Election Commission*, 540 U.S. 93, 192-93 (2003) (facially upholding a part of federal campaign finance legislation by construing it to apply solely to corporate expenditures for express advocacy for a candidate in a federal election and not to pure issue advocacy); *Buckley v. Valeo*, 424 U.S. 1, 42 (1976) (narrowing the phrase "any expenditure . . . relative to a clearly identified candidate" to mean any expenditure "advocating the election or defeat of a candidate").

invalidated.[2] *Id.* at 631 (Douglas, J., dissenting with Black, J., concurring) & 634 (Jackson, J., dissenting).

Since *Harriss*, lower courts have struggled with whether state laws imposing burdens on grassroots lobbying facially violate the First Amendment. As will be discussed in Point II, they have reached inconsistent results. The trend, however, has been decidedly toward facially upholding broader and broader laws imposing heavier and heavier burdens on political speech. Some of the decisions have placed reliance on that part of *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), that upheld the facial validity of section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b, a provision that prohibits independent corporate

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[2] The law at issue in *Harriss*, the Federal Regulation of Lobbying Act, title III of the Legislative Reorganization Act of 1946, Pub. L. No. 79-601, §§ 301-11, 60 Stat. 812, 839-42, codified at 2 U.S.C. § 261-70, has been twice amended since *Harriss*. The Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, expanded coverage to include contacts with staff and broaden the definition of lobbyist, but did not include indirect lobbying. *See* William V. Luneberg & Thomas Sussman, *The Lobbying Manual* at 46 (ABA 3d ed. 2005) ("the LDA was enacted only after the leaders of the reform removed the last vestiges of its express coverage of grassroots lobbying"). The Honest Leadership and Open Government Act of 2007, also expanded the law, but also not to cover indirect or grassroots lobbying. *See generally Nat'l Ass'n of Mfrs. v. Taylor*, 549 F. Supp. 2d 33 (D.D.C. 2008) (upholding the 2007 amendment). Congress defeated section 220 of the Lobbying Transparency and Accountability Act of 2007, S. 1, 110th Cong. § 220 (2007), which would have so extended the federal law.

expenditures for "express advocacy" for candidates in federal elections.[3] *McConnell* supports the argument that restrictions on grassroots lobbying are facially valid because section 203's restriction on corporate "express advocacy" has the effect of suppressing "pure issue advocacy" in light of the difficulty of distinguishing "express advocacy" from "pure issue advocacy." *See Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 127 S.Ct. 2652, 2679-84 (2007) (Scalia, J., dissenting) ("*McConnell* was mistaken in its belief that as-applied challenges could eliminate the unconstitutional applications of § 203"). If the First Amendment can tolerate a law that regulates independent corporate expenditures for pure issue advocacy in federal elections, so the argument goes, then surely it can tolerate a law that regulates lobbyists' grassroots or indirect lobbying through publication of newsletters, writing letters to the editor, and public speaking.

A case now pending before this Court, *Citizens United v. Federal Election Commission*, 530 F. Supp. 2d 275 (D.D.C. Jan. 15, 2008) (denying preliminary injunction); 2008 WL 2788753 (D.D.C. 2008), *prob. juris. noted,* 129 S.Ct. 594 (U.S. Nov. 14, 2008) (No. 08-205), *returned to oral arg. docket,* 2009 WL 1841614 (U.S. June 29, 2009), seriously calls into question, however, the critical holding of *McConnell.*

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[3] *See, e.g., Minn. Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1111-12 (2005) (citing *McConnell*) (discussed in Part II infra).

Although the petitioners focused on whether section 203 constitutionally could be applied to a documentary entitled *Hillary: The Movie*, after hearing oral argument, the Court entered an order on June 29, 2009, asking the parties for new briefs addressing the following question:

> For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. §441b.

If the Court overturns these important precedents on the issue of the facial constitutionality of restraints on independent corporate expenditures in political elections, this seriously will call into question federal decisions upholding the facial constitutionality of restraints on indirect lobbying, including the decision of the Eleventh Circuit below. Both types of restraints apply to core political speech and both pose minimal risks of corrupting political processes. Both also have been defined in vague terms, creating grave danger to protected speech. *Wisconsin Right to Life,* 127 S.Ct. at 2669. If one is facially invalid, it follows that the other must be as well. At a minimum, the Court should grant this petition, vacate the Eleventh Circuit's decision, and remand the case for

reconsideration in light of the Court's disposition of *Citizens United.*

B. The Ruling on the Gift Ban Also Will be Undermined

The Florida gift ban challenged below may now be the most restrictive in the country. The law is so strict that it prohibits a lobbyist even from buying a legislator a cup of coffee.[4] Like the grassroots lobbying disclosure requirements, the absolute ban on gifts was passed without evidence that it is necessary to prevent corruption.

As important, the law imposes a vague and broad restraint on the valuable information exchanges that gifts can engender between lobbyists and government officials. Lobbyists assist their clients' efforts to petition government by providing an indispensable element of the legislative process – communication of people's needs and wishes to their legislators. *See generally Eastern R.R. Presidents Conference v. Noerr Freight, Inc.*, 365 U.S. 127 (1961). Their communications may take the form of a gift such as a book on pollution, a documentary regarding global warming, a collection of newspaper articles regarding abortion, a

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[4] *See, e.g.*, Troy Kinsey, *Some Say Ban on Giving Gifts to Politicians is Going Too Far,* WCTV-TV (Tallahassee) (Mar. 22, 2008) (http://www.wctv.tv/home/ headlines/16923181.html) ("be it a steak, a ticket to a basketball game, even a cup of coffee, lawmakers have to pay their own way").

pamphlet on gun ownership, a detailed report specifically advocating for or against legislation to help the homeless or to cure AIDS, or an educational trip to the Everglades. Yet, the Florida law applies to all such gifts and prohibits them whether provided directly or indirectly.

The Florida law expressly applies to direct and indirect gifts. Lobbyists thus are prohibited from donating to educational, charitable, and not-for-profit organizations associated with or favored by a legislator if the donation could be characterized as an "indirect" gift. The Florida law has been this broadly interpreted even though such indirect donations, like grassroots lobbying and corporate express advocacy, create little or no risk of corruption and have significant value by providing organizations with resources needed to further their causes.[5]

If the Court overturns *Austin* and *McConnell* and holds that laws facially violate the First Amendment when they impose significant restrictions on political speech that creates no risk of corruption

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[5] *See* Steve Bousquet, *Lawmakers Find Ways Around Lobby Rules – Thirteen State House Members Have Formed a Charity that Accepts Donation from Lobbyists. They Say They're Not Breaking the Rules,* The Miami Herald (July 11, 2009) (discussing conflicting interpretations of the Florida law provided by House counsel and the Senate rules); *compare* Fla. H. Rep. Off. of Gen. Counsel Formal Op. 07-06 (House members may solicit lobbyists to contribute to charities with which they have no involvement) *with* Fla. Sen. R. 1.361(1) (prohibiting senators from soliciting for charities during legislative sessions).

ascertainable by the Court exercising independent judicial review, the Court should grant this petition and, at a minimum, remand the case for reconsideration.

II. The Decision Conflicts with Decisions of this Court, Other Courts of Appeals and a State Supreme Court

Even, however, if section 203 is not facially invalidated, the Court should grant this petition because the Eleventh Circuit's decision is at odds with long-standing principles announced by this Court, decisions of other federal courts of appeals, and one state supreme court decision.

A. The Grassroots Lobbying Disclosure Requirement is Contrary to Precedents Facially Invalidating Indirect Lobbying & Independent Expenditure Regulations

In *Harriss* the Court held the disclosure requirements of the Federal Regulation of Lobbying Act apply only where (1) the person solicited, collected, or received contributions, (2) one of the main purposes of such person or of such contributions must have been to influence the passage or defeat of legislation by Congress, and (3) "the intended method of accomplishing this purpose must have been through *direct communication with members of Congress*." *Id.* at 623 (emphasis added). "Thus construed [the law does] not

violate the freedoms guaranteed by the First Amendment-freedom to speak, publish, and petition the Government." *Id.* at 625. The majority acknowledged that the disclosure requirements of the law "may as a practical matter act as a deterrent to [the] exercise of First Amendment rights . . . because of fear of possible prosecution for failure to comply with the Act," but explained its "narrow construction of the Act, precluding as it does reasonable fears, is calculated to avoid such restraint." *Id.* at 626.

In the same term, this Court narrowly interpreted a congressional resolution in *United States v. Rumely,* 345 U.S. 51 (1953), so as to authorize a committee to investigate only "direct" lobbying activities, and affirmed a court of appeals ruling that stated: "It is said that indirect lobbying by the pressure of public opinion on the Congress is an evil and a danger. That is not an evil; it is a good, the healthy essence of the democratic process." *Rumely v. United States*, 197 F.2d 166, 174 (D.C. Cir. 1952).

Justice Douglas, joined by Justice Black, dissented in *Harriss*, disagreeing with the majority that the law could be narrowly construed because he found "no warrant in the Act for drawing the line, as the Court does, between 'direct communication with Congress' and other pressures on Congress. The Act is as much concerned with one, as with the other." *Id.* at 631 (Douglas, J., dissenting). He saw no basis to exclude from the coverage of the act efforts to influence Congress by "radio, television of advertising measures promoting a particular measure, as well as

the 'button holing' of Congressmen." *Id.* Justice Douglas asked, "Can Congress require one to register before he writes an article, makes a speech, files an advertisement, appears on radio or television, or writes a letter seeking to influence existing, pending, or proposed legislation? That would pose a considerable question under the First Amendment." *Id.*

Justice Douglas then proceeded to answer his own question: "The language of the Act is so broad that one who writes a letter or makes a speech or publishes an article or distributes literature or does many of the other things with which appellees are charged has no fair notice when he is close to the prohibited line. . . . Since the Act touches on the exercise of First Amendment rights, and is not narrowly drawn to meet precise evils, its vagueness has some of the evils of a continuous and effective restraint." *Id.* at 632-33. He cautioned that upholding the law and leaving to judges the task of adjudicating individual applications of the law would not suffice. He explained that "if Congress could impose registration requirements on the exercise of First Amendment rights, saving to the courts the salvage of the good from the bad, and meanwhile causing all who might possibly be covered to act at their peril, the law would in practical effect be a deterrent to the exercise of First Amendment rights." *Id.* at 632.

Justice Jackson also dissented, noting that the "clearest feature of the Court's decision is that it leaves the country under an Act which is not much like the Act passed by Congress. . . . I recall few cases

in which the Court has gone so far in rewriting an Act." *Id.* at 634 (Jackson, J.). He agreed with Justice Douglas that the law could not be narrowly construed and he advocated facial invalidation. "As long as this statute stand on the books, its vagueness will be a contingent threat." *Id.* at 635. Justice Jackson also warned that "It does not seem wise to leave the scope of a criminal Act, close to impinging on the right of petition, dependent upon judicial construction for its limitations. Judicial construction, constitutional or statutory, always is subject to hazards of judicial reconstruction." *Id.*

The Eleventh Circuit acknowledged *Harriss* as a relevant precedent, but then neither narrowed the law before it as did the *Harriss* majority nor heeded the dissenters' conclusion that an unnarrowed law facially violates the First Amendment. It construed the Florida law to mean literally what it says – imposing disclosure requirements on both direct *and* indirect attempts to influence legislators and executive agency officials, yet upheld the law as facially valid.[6]

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[6] This Court could reject the Eleventh Circuit's interpretation of the Florida law, but this would be contrary to the Court's settled practice of deferring to the courts of appeals' interpretation of state law. *See McMillian v. Monroe County*, 520 U.S. 781, 787 (1997) (noting that where two Eleventh Circuit panels had reached the same conclusion regarding state law, this interpretation would be accepted); *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 738 (1989) ("We think the Court of Appeals [for the Fifth Circuit], whose expertise in

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Because a majority did not decide the constitutional issues in *Harriss* and *Rumely*, however, lower courts have taken it upon themselves to do so in examining state laws and they have reached inconsistent results.

In *Montana Auto Association v. Greeley,* 632 P.2d 300, 307 (Mont. 1981), the Montana supreme court invalidated disclosure requirements applied to indirect lobbying activities. The court relied on this Court's observation in *Rumely* that:

> Surely it cannot be denied that giving the scope to the resolution for which the Government contends, that is, deriving from it the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment.

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interpreting Texas law is greater than our own, is in a better position to determine whether [the school district superintendent] possessed final policymaking authority in the area of employee transfers"); *Virginia v. American Booksellers Assn., Inc.*, 484 U.S. 383, 395 (1988) (the Court "rarely reviews a construction of state law agreed upon by the two lower federal courts"); *Pembaur v. Cincinnati*, 475 U.S. 469, 484 n.13 (1986) (plurality opinion) ("We generally accord great deference to the interpretation and application of state law by the courts of appeals") (citing many cases).

Greeley, 632 P.2d at 307 (quoting *Rumely,* 345 U.S. at 46). The court held that press licensing had been prohibited in *Mills v. Alabama*, 384 U.S. 214, 218-20 (1966), and noted that under the Montana lobbying law, as drafted, "Even newspaper editorials . . . would constitute lobbying activity. . . . Facially, [the law] constitutes a more drastic infringement on freedom of the press and freedom of speech than was present in Mills v. Alabama," *Greely,* 632 P.2d at 308.

In cases where the statutes at issue were no broader than the federal lobbying law construed in *Harriss*, or at least could be so construed, lower courts have had no difficulty upholding them as constitutional. *See Commission on Independent Colleges and Universities v. New York Temporary State Commission*, 534 F. Supp. 489, 498 (N.D.N.Y. 1982) (finding the New York state lobby law, construed to require disclosure of efforts to "exhort the public to make such direct contact with legislators as outlined in Harriss," did not violate the First Amendment); *Pletz v. Secretary of State*, 336 N.W.2d 789, 795 (Mich. 1983) (upholding state law when applied to solicitations of others to make direct communications).

But more recently, courts have upheld laws regulating indirect lobbying. The Vermont supreme court concluded that "Provisions that reach 'indirect' lobbying activities beyond the parameters found in *Rumely* and *Harriss* are not . . . necessarily unconstitutional; in fact, the Court intimated in these cases that Congress could require more stringent reporting." *Kimbell v. Hooper*, 665 A.2d 44 (Vt. 1995).

The Court noted that in the context of campaign finance legislation this Court had held in *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976), that "government interests sought to be vindicated by disclosure requirements to be of sufficient magnitude to counterbalance infringements on First Amendment rights." *Kimbell*, 665 A.2d at 86. Consequently, the Vermont supreme court held disclosure requirements applicable to such indirect "lobbying" activities as research, meetings with clients, preparation of materials, formation of coalitions, participation in talk shows, and sending letters to newspaper editors are facially constitutional.[7] *Id.*

In *Minnesota State Ethical Practices v. Nat'l Rifle Ass'n*, 761 F.2d 509, 512 (8th Cir. 1985), the Eighth Circuit read *Harriss* broadly to allow disclosure requirements to be imposed on communications such as internal communications among members of an organization, rather than only direct communications with legislators. The court upheld a Minnesota law requiring the NRA and its Political Victory Fund and individuals employed by the organizations to register their lobbying and political funding activities. At issue in the case were letters from the NRA to its members urging them to contact their state legislators to support three pieces of pending legislation and the defeat of Warren Spannaus, a candidate for

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[7] *See also Young Americans for Freedom, Inc. v. Gorton*, 522 P.2d 189 (Wash. 1974) (upholding grassroots lobbying disclosure provisions that did not require identification of contributors).

governor. The NRA asserted that such internal communications were distinct from the direct communications with Congress at issue in *Harriss*. The Eighth Circuit rejected the argument, giving *Harriss* an expansive reading.

The Eleventh Circuit first examined the constitutionality of lobbyist disclosure requirements 13 years ago in *Florida League of Professional Lobbyists, Inc. v. Meggs*, 87 F.3d 457 (11th Cir. 1996). The plaintiff there brought a facial challenge to a 1993 amendment to sections 11.045(4) & 112.3215, Florida Statutes, chapter 93-121, Laws of Florida, that provided that "a lobbyist hired by a principal shall disclose all lobbying expenditures, whether made by the lobbyist or by the principal, and the source of funds for all such expenditures." *Meggs*, 87 F.3d at 458. Under the 1993 law, a lobbyist's or principal's salary, office expenses, and personal expenses for lodging, meals, and travel specifically were excluded from the definition of expenditures. *See* Fla. Stat. § 11.045(3)(a) (1993).

The *Meggs* court, like the *FAPL* court, looked to this Court's decision in *Harriss* to decide the question and found that it did not provide a clear answer. It noted that the Court had construed the Federal Regulation of Lobbying Act so that it applied solely to "direct" contacts between lobbyists and officials and that the "Florida statute seems to sweep somewhat more broadly, bringing more 'indirect' lobbying, such as research and media campaigns, within its scope." *Meggs*, 87 F.3d at 460-61. The Eleventh Circuit

nevertheless upheld the Florida statute in reliance on lower court decisions such as *Minnesota State Ethical Practices*.

The Eighth Circuit returned to the disclosure issue in *Minnesota Citizens Concerned for Life, Inc. v. Kelley,* 427 F.3d 1106 (2005). There, a non-profit corporation whose purposes included informing the public on abortion and related topics, published the results of a questionnaire identifying a candidate's position on such issues without expressly advocating the election or defeat of specific candidates. The law at issue, Minn. Stat. § 10A.084 required lobbyists to report each source of over $500 per year that MCCL used for lobbying, including the source's name, address and employer. A Minnesota Campaign Finance and Disclosure Board advisory opinion interpreted subdivision 4(d) to require that a lobbyist principal provide its lobbyists the names of all persons (1) who earmarked donations over $500 to MCCL for lobbying, or (2) those "whose aggregate contributions multiplied by the percentage of the budget the lobbyist principal used for lobbying is greater than $500.

MCCL claimed that this allocation formula violated its contributors' rights to free speech and association with an advocacy organization because it required disclosure not only of contributors for *direct* lobbying, but also contributors for pure issue advocacy. The Eighth Circuit rejected this assertion, expressly relying on the holding of *McConnell v. Fed. Election Comm'n,* 540 U.S. 93, 192-93 (2003), that a line had been drawn between express advocacy and

pure issue advocacy merely to narrowly construe an overbroad, vague statute, and not to establish a constitutional rule that disclosure requirements cannot be imposed on pure issue advocacy. *Kelley*, 427 F.3d at 1111-12. In essence, the Eighth Circuit treated both *McConnell* and *Harriss* as leaving the door open for broad restrictions on indirect lobbying simply because they did not address whether restrictions on pure issue advocacy or indirect lobbying, analogous forms of core political speech, would be facially invalid.[8]

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[8] A Congressional Research Service Report also made the connection between *McConnell's* decision to uphold section 203 facially and the constitutionality of laws regulating grassroots lobbying while Congress was debating such a law in 2007. *See* Jack Maskell, *Grassroots Lobbying: Constitutionality of Disclosure Requirements* at 11, CRS Report for Congress (Jan. 12, 2007) (http://assets.opencrs.com/rpts/RL33794_20070112.pdf) (observing *McConnell* "upheld the disclosure requirement, even for so-called issue advocacy (as opposed to the 'express advocacy' of the election or defeat of an identified candidate), when those use ads ran in certain time frame before an election for federal office, thus finding, in effect, that such groups do have enough of a 'direct and intimate' relation to the political process to justify disclosing the required information regarding their activities"). The report concluded, in reliance on *McConnell* and many of the state and federal cases discussed herein that:

> it would appear that a federal statute which requires only disclosure and reporting, and does not prohibit any activity, and which reaches only those who are compensated to engage in a certain amount of the covered activity (leaving volunteer organizations, volunteers, and other individuals who engage in such activities on their own accord out of the coverage and

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In light of these decisions, the Eleventh Circuit interpreted *Harriss* in the instant case to mean that "the First Amendment allows required reporting of considerably more than face-to-face contact with government officials." *FAPL*, 525 F.3d at 1080. The Eleventh Circuit observed that in *Harriss*, 347 U.S. 612, the Court had upheld the disclosure requirements in the Federal Regulation of Lobbying Act of 1946, by construing the disclosure requirements narrowly to cover only those "'contributions and expenditures having the purpose of attempting to influence legislation through *direct communication with Congress*.'" *FAPL*, 525 F.3d at 1080 n.8 (quoting *Harriss*, 347 U.S. at 623). The communications at issue in *Harriss* were expenditures by the National Farm Committee for compensation to others to communicate face-to-face with members of Congress, at public functions and committee hearings on legislation affecting agricultural prices, and for a campaign to induce various interest groups and individuals to communicate by letter with members of Congress on such legislation.

> sweep of the provisions), would appear to fit within those types of provisions which have been upheld in judicial decisions when the statute is drafted in such a manner so as not to be susceptible to an overly broad sweep bringing in groups, organizations and other citizens who do no more than advocate, analyze and discuss public policy issues and/or legislation.

Id. at 18-19. Still, Congress rejected the proposed extension of the federal law to grassroots lobbying.

Such *direct* communications are a far cry from the "opinion articles" and "issue advertisements" that the Eleventh Circuit construed as triggering the reporting requirements of the Florida law at issue here.[9] The Court has recognized, as a matter of historical fact, that requiring registration and disclosure of funding of all such activity will deter such a substantial amount of protected speech that a statute which may have other legitimate aims cannot stand. *See, e.g., Harriss,* 347 U.S. at 631-32 (Douglas, J., dissenting) (citing cases). This is what motivated the *Harriss, Buckley*, and *McConnell* majorities to construe the federal laws before them narrowly and it is critical at this juncture for the Court to reaffirm that when laws are not so construed, as occurred here, they are facially invalid.

Expenditures for lobbying that do not involve direct contacts with the lobbied entity are the same type of speech as independent expenditures for campaigns. Both are made to influence a political process, both are core political speech, but neither has the necessary proximity to legislators that creates the

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[9] The Florida Legislature Office of Legislative Services recently responded to an inquiry from the Competitive Enterprise Institute, a non-profit, non-partisan public policy and educational organization established as a section 501(c)(3) organization that even when it is not "promoting or discouraging a piece of legislation," it is engaged in lobbying as long as it is "attempting to influence legislative action or nonaction." Fla. Leg. Off. of Leg. Servs. Lobbyist Reg. Inf. Op. No. 08-01 (Dec. 5, 2008).

substantial risk of corruption needed to justify significant regulation or even proscription. Laws imposing regulation on both types of speech simply deter a substantial amount of protected speech by those who fear identification, retribution, and punishment for noncompliance without yielding countervailing benefits.

With these principles in mind, the Eleventh Circuit's decision to uphold the law at issue facially can be seen as conflicting with decisions of the D.C., Fourth, and Fifth Circuits that have invalidated laws requiring disclosure of indirect campaign expenditures.

In *Buckley v. Valeo*, 519 F.2d 821, 832 (D.C. Cir. 1975), *rev'd in part*, 424 U.S. 1 (1976), the D.C. Circuit held that a campaign-expenditure disclosure requirement was unconstitutionally vague and overbroad because it required "reporting by groups whose only connection with the elective process arises from completely nonpartisan public discussion of issues of public importance." This Court noted in its review of *Buckley* that this decision of the D.C. Circuit was not appealed. *Buckley*, 424 U.S. at 11 n.7.

In *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), this Court held that an Ohio law which prohibited the distribution of anonymous campaign literature facially abridges the First Amendment. Justice Stevens, with the concurrence of six other justices, expounded on the traditions of anonymous political speech, referencing works such as the Federalist Papers that were published under fictitious

names. Because section 4(b) of the Florida law prohibits the provision of "compensation for lobbying to any individual or business entity that is not a lobbying firm," the law effectively prohibits the funding of an anonymous issue-advocacy campaign. Under the statute, a "lobbyist" would have to be hired under section 4(b) and payments made to that "lobbyist" and "lobbying firm" would have to be disclosed under sections (2) and (3).

In *North Carolina Right To Life, Inc. v. Leake*, 525 F.3d 274, 283, 289 (4th Cir. 2008), the Fourth Circuit invalidated a state campaign finance law as facially unconstitutional because it imposed regulations, including reporting requirements, on speech that is "neither express advocacy nor its functional equivalent, and therefore, strays too far from the regulation of elections into the regulation of ordinary political speech," and because "imposing a political committee designation – and its associated burdens – on entities when influencing elections is only a major purpose of the organization . . . expands the definition of political committee beyond constitutional limits." (internal quotations omitted).

In *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 713 (4th Cir. 1999), the Fourth Circuit invalidated a state law as facially unconstitutional on vagueness and overbreadth grounds because it "subject[ed] groups engaged in only issue advocacy to an intrusive set of reporting requirements."

In *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 664-65 (5th Cir. 2006), the Fifth Circuit narrowly construed a state disclosure law as only applying to "communications that expressly advocate the election or defeat of a clearly identified candidate" in order to "save[ ] it from constitutional infirmity."

Federal trial court decisions have reached similar results, as have several state supreme court decisions. For example, in *National Right To Work Legal Defense & Education Foundation, Inc. v. Herbert*, 581 F. Supp. 2d 1132, 1153-54 (D. Utah 2008), the district court held: "By diluting *Buckley's* test and regulating entities that make any disbursement to influence a ballot proposition, Utah runs the risk of burdening a substantial amount of constitutionally protected speech. Accordingly, [the state law] is unconstitutional, on its face." (internal quotations omitted). *See also Wisc. Realtors Ass'n. v. Ponto*, 233 F. Supp. 2d (W.D. Wis. 2002); *Stenson v. McLaughlin*, No. Civ. 00-514-JD, 2001 WL 1033614 (D.N.H. Aug. 24, 2001); *ACLU v. N.J. Election Law Enforcement Comm'n*, 590 F. Supp. 1123 (D.N.J. 1981); *Fair Political Practices Comm'n v. Superior Court*, 599 P.2d 46 (Cal. 1979); *State v. White*, 506 N.E. 2d 1284 (Ill. 1987); *Mont. Auto. Ass'n v. Greely*, 632 P.2d 300 (Mont. 1981); *N.J. State Chamber of Commerce v. N.J. Law Enforcement Comm'n*, 411 A.2d 168 (N.J. 1980).

There is no reason that laws regulating indirect campaign expenditures should be regarded as facially

unconstitutional while laws regulating indirect, grassroots lobbying expenditures are not.

B. The Ban on Direct and Indirect Gifts from Lobbyists Also is Contrary to Precedents Facially Invalidating Laws that Suppress Speech Without Preventing Corruption

In *Randall v. Sorrell,* 548 U.S. 230 (2006), this Court examined a state law that limited both the amounts that candidates for state office could expend on their own campaigns and the amounts that individuals, organizations and political parties could contribute to those campaigns. The Court easily concluded that *Buckley* itself required facial invalidation of the very low limits imposed on expenditures. *Id.* at 245-46. It then also invalidated facially very low contribution limitations.

The Court held that while states have significant discretion to limit contributions to prevent corruption, "contribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." *Id.* at 248-49. The Court used "independent judicial judgment" to examine the record in the case before it to ascertain whether the potential corrupting influence of contributions larger than those allowed outweighed the potential harm that the law limits would impose. *Id.* at 249.

The Court found that "Vermont's contribution limits are the lowest in the Nation," that its limits were "well below the lowest limit this Court has previously upheld," that the law would restrict the funding available for challengers of incumbents, yet the record "contains no indication that . . . corruption (or its appearance in Vermont is significantly more serious a matter than elsewhere"). *Id.* at 253-61. Accordingly, it struck down the law.

Gifts to legislators and other state officials, like campaign contributions, also do not *always* corrupt the political process and sometimes significantly enhance the political process. Forty-three states do not impose a ban on gifts, recognizing that such an extreme restriction on the activities of lobbyists is not necessary.[10] Yet, the defendants in the instant case

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[10] Seven other states prohibit gifts to legislators altogether. *See* Colo. Const. art. XXIX § 3; Ky. Rev. Stat. Ann. §§ 6.611 & 6.751; Mass. Gen. Laws ch. 3, § 43; Minn. Stat. § 10A.071(2); S.C. Code Ann. §§ 8-13-100 & 705; Tenn. Code Ann. §§ 3-6-301(11), 304 & 305(b); Wis. Stat. §§ 19.42(1), 19.45 & 13.625; *see also* Rebecca L. Anderson, *The Rules in the Owners' Box: Lobbying Regulations in State Legislatures*, 40 Urb. Law 375, 394 & n. 190 (2008). Section 206 of the Honest Leadership & Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735, codified at 2 U.S.C. § 1601, also includes a ban on gifts to a member of Congress or staffer if the person has knowledge that the gift or travel offered may not be accepted under House and Senate rules. The rules contain "numerous exceptions to the 'absolute' ban on gifts." Thor Hearne & Amy Blunt, *Federal Lobbying Regulation – The New Federal Lobbying Regulations, & What In-House Counsel Need to Know About Them*, 3 Bloomberg Corp. L. J. 65, 69 (2008). Lobbyists and their employers

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offered no evidence that Florida faces a gift problem different from those faced by the 43 states that allow gifts or that the benefits the law would yield in terms of protecting Florida from corruption would outweigh the harm that it would do to First Amendment rights to petition the government and to associate freely. Indeed, the defendants pointed not to a single example of a gift given to a Florida legislator or other official that had corrupted the legislator or official. The defendants also made no attempt to show that less restrictive laws such as those requiring disclosure of gifts or limiting the amount of gifts would be insufficient to achieve the desired objective. Accordingly, the Florida gift ban should meet the same fate as the Vermont law reviewed in *Randall*.

Few courts have reviewed wholesale gift bans, but when they have they have been found unconstitutional.

A trial court in Colorado entered a 41-page preliminary injunction against a Colorado constitutional amendment banning gifts by lobbyists to

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may host "widely attended" gatherings and participate in charitable events that honor the official and if a bona-fide "friendship" relationship exists between the giver and the received, the gifts are allowed. *Id. See also* U.S. House of Reps. R. XXV, 110th Cong. House Rules Manual – H. Doc. No. 109-157 & U.S. Sen. Standing R. XXXV, 110th Con. Sen. Manual – S. Doc. 110-1. Thus the federal law is significantly less restrictive than the Florida law.

legislators in *Developmental Pathways v. Ritter,* No. 07CV1353, Dist Ct. City & County of Denver Colo. (May 31, 2007) (http://www.courts.state.co.us/Media/Opinion_Docs/07CV1353PreliminaryInjunction.pdf), *rev'd on other grounds*, 178 P.3d 525 (Colo. 2008) (holding claim was not ripe). "The laudable goals of the Amendment," the trial judge held, "must be weighed against the preservation of the very core of our Democracy – something dependent upon a 'well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate' issues. *Buckley v. Valeo,* 4242 U.S. 1, 49 (1976)." *Ritter,* No. 07CV1353, at 40-41. The court, citing *First National Bank of Bellotti,* 435 U.S. 765, 776-77, 790 (1978), held that lobbyists, like corporations are protected by the First Amendment, that the mere fact that they are effective does not provide a basis for restricting speech, that information has value and "information itself is subject to the gift ban," and a broad ban on all gifts would not only stop communications between lobbyists, but would discourage controversial organizations such as Focus on the Family and Planned Parenthood from hiring lobbyists to convey their views for fear that they would be charged with violating the ban by meeting with legislators at fundraisers, meetings, and mealtimes. *Id.* at 31-32. The court also found the law impinges on legislators' right to receive information and to attend fact-finding trips or conferences. *Id.* at 32.

In *Barker v. Wisconsin Ethics Board,* 841 F. Supp. 2d 255 (W.D. Wisc. 1993), a federal district court

invalidated a state law prohibiting lobbyists from furnishing to candidates for elective office "any other thing of pecuniary value" aside from specified monetary contributions violated the First Amendment insofar as it prohibited uncompensated personal services by lobbyists on behalf of candidates. *Cf. Fair Political Practices Committee v. Superior Court*, 157 Cal. Rptr. 855 (Cal. 1979) (prohibiting campaign contributions by lobbyists, but not by others, violates the First Amendment).

Before more states adopt the blunt instrument of a complete gift ban that sweeps within its prohibitions a substantial amount of protected speech that poses no threat of corruption, this Court should review and invalidate the Florida gift ban as facially overbroad.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: August 5, 2009

Respectfully submitted,

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App. 1

United States Court of Appeals
for the Eleventh Circuit

Case No. 07-10435
May 7, 2009.

Appeal from the U.S. District Court for the
Northern District of Florida
(No. 06-00123-CV-4-SPM-WCS)

FLORIDA ASSOCIATION OF PROFESSIONAL LOBBYISTS INC., a Florida not for profit corporation, SPEARMAN MANAGEMENT COMPANY, a Florida corporation, GUY M. SPEARMAN, III, a natural person, RONALD L. BOOK, PA, a Florida professional association, RONALD L. BOOK, a natural person,
Plaintiffs-Appellants,

v.

DIVISION OF LEGISLATIVE INFORMATION SERVICES OF THE FLORIDA OFFICE OF LEGISLATIVE SERVICES, a Florida state agency, THE FLORIDA COMMISSION ON ETHICS, an independent constitutional commission, TOM LEE, as president of the Florida Senate, ALLAN BENSE, as speaker of the Florida House of Representatives, Defendants-Appellees..

(Before EDMONDSON, Chief Judge, DUBINA, Circuit Judge and MARTIN,* District Judge.)

(PER CURIAM.) In the light of our earlier opinion in this case and the opinion of the Supreme Court of Florida on questions of Florida law that we had certified to that honorable Court, we affirm the judgment of the district court. For background, see Fla. Ass'n of Prof'l Lobbyists v. Div. of Legislative

Info. Servs., 525 F.3d 1073 (11th Cir. 2008), and Fla. Ass'n of Prof'l Lobbyists v. Div. of Legislative Info. Servs., No. 08-791, 2009 WL 702854 (Fla. Mar. 19, 2009).

AFFIRMED.

App. 3

United States Court of Appeals
for the Eleventh Circuit

Case No. 07-10435.

April 23, 2008.

Appeal from the U.S. District Court
for the Northern District of Florida

(No. 06-00123-CV-4SPM-WCS).

FLORIDA ASSOCIATION OF PROFESSIONAL LOBBYISTS, INC., a Florida not for profit corporation, SPEARMAN MANAGEMENT COMPANY, a Florida corporation, GUY M. SPEARMAN, III, a natural person, RONALD L. BOOK, PA, a Florida professional association, RONALD L. BOOK, a natural person, Plaintiffs-Appellants,

v.

DIVISION OF LEGISLATIVE INFORMATION SERVICES OF THE FLORIDA OFFICE OF LEGISLATIVE SERVICES, a Florida state agency, THE FLORIDA COMMISSION ON ETHICS, an independent constitutional commission, TOM LEE, as president of the Florida Senate, ALLAN BENSE, as speaker of the Florida House of Representatives, Defendants-Appellees.

Before EDMONDSON, Chief Judge, DUBINA, Circuit Judge, and MARTIN,* District Judge.

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* Honorable Beverly B. Martin, United States District Judge for the Northern District of Georgia, sitting by designation.

(PER CURIAM.) *CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF FLORIDA, PURSUANT TO FLA. R. APP. P. 9.150(a). TO THE SUPREME COURT OF FLORIDA AND ITS HONORABLE JUSTICES:*

In this case, we are asked to assess the constitutionality of legislation enacted by the Florida Legislature that regulates legislative and executive lobbying in the State of Florida. The Florida Association of Professional Lobbyists, Inc., et al., ("Plaintiffs") assert that the legislation – Chapter 2005-359, Laws of Florida ("the Act") – is facially unconstitutional under both the Florida and United States Constitutions. They challenge the Act on four grounds, three of which involve questions of Florida constitutional law and one of which involves a question of federal constitutional law. Because our resolution of the state law questions in this case is a matter of Florida constitutional law to which the Florida Supreme Court has not definitively spoken, we certify these questions to the Florida Supreme Court. For the remaining federal law question, we affirm the district court's decision that the Act was not unconstitutionally vague or overbroad.

I. Background

At a special session in December 2005, the Florida Legislature passed the Act, now codified at sections 11.045 and 112.3215 of the Florida Statutes,

which regulates legislative and executive lobbying activities in the State of Florida. According to the Act, "no lobbyist or principal shall make, directly or indirectly, *and* no member or employee of the legislature," Fla. Stat. § 11.045(4)(a) (emphasis added), nor any "agency official, member, or employee shall knowingly accept, directly or indirectly, any expenditure," *id.* § 112.3215(6)(a).[1] Given the use of the conjunctive "and," the Act does not bar all lobbying expenditures; instead, it bars only those expenditures that are made for lobbying purposes *and* are accepted by an official.

The Act also includes a disclosure provision that requires lobbying firms to file quarterly statements reporting the total compensation paid or owed by their "principals" – that is, their clients. *Id.* §§ 11.045(3)(a)1.c, 112.3215(5)(a)1.c. Lobbying firms must also disclose the full name, business address, and telephone number of each principal, as well as the total compensation that each principal paid or owed to the lobbying firm. *Id.* §§ 11.045(3)(a)2, 112.3215(5)(a)2.

In addition to the disclosure provision, the Act has enforcement provisions that allow for audits as well as for the filing of sworn complaints. *Id.*

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[1] The term "expenditure" is defined as "a payment, distribution, loan, advance, reimbursement, deposit, or anything of value made by a lobbyist or principal for the purpose of lobbying." Fla. Stat. §§ 11.045(1)(d), 112.3215(1)(d).

§§ 11.045(7)-(8), 112.3215(8)-(10). For legislative lobbying, every sworn complaint or audit indicating a possible violation (with the exception of an untimely report) is subject to investigation by designated committees of either house of the Legislature. *Id.* § 11.045(7). If a violation is found, the committee must report its findings, together with a recommended penalty, to either the President of the Senate or Speaker of the House, as appropriate. *Id.* The President of the Senate or Speaker of the House then submits the committee report and recommendation to their respective chamber; and a final determination is made by a majority vote of the members. *Id.* Authorized penalties include "a fine of not more than $5,000, reprimand, censure, probation, or prohibition from lobbying for a period of time not to exceed 24 months." *Id.*

For executive lobbying, every sworn complaint or audit indicating a possible violation (with the exception of an untimely report) is subject to investigation by the Commission on Ethics. *Id.* § 112.3215(8)(a), (c). If the Commission finds probable cause of a violation, then it submits a report to the Governor and the Cabinet for a determination of the penalty. *Id.* § 112.3215(9), (10). Authorized penalties include reprimand, censure, or a prohibition on lobbying any agency for a period not to exceed two years. *Id.* § 112.3215(10). But, "[i]f the violator is a lobbying firm, the Governor and Cabinet may also assess a fine of not more than $5,000." *Id.*

In the district court, Plaintiffs sought a declaration that the Act was facially unconstitutional. They also sought preliminary and permanent injunctions against the Act's enforcement. Plaintiffs argued that the Act was not validly passed by the legislature because it was not read three times after it was introduced by the House. They argued that the Act infringed upon the Florida Supreme Court's authority to regulate the practice of law; and they argued that the Act contravened Florida's separation of powers doctrine. Plaintiffs also argued that the Act's expenditure restrictions, disclosure requirements, and enforcement provisions violated their rights to free speech, due process, equal protection, and privacy under both the United States and Florida Constitutions.[2] The district court denied Plaintiffs' motions for preliminary injunction and summary judgment, concluding that Plaintiffs were unlikely to succeed on their claims. The district court then granted summary judgment to the Division of Legislative Information Services, et al., ("Defendants") on all of Plaintiffs' claims. Plaintiffs now appeal.

II. Discussion

On appeal, Plaintiffs raise four issues. Three involve questions of state constitutional law: (1)

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[2] This lawsuit was originally filed in state court but was then removed to federal district court on the basis of federal question jurisdiction with supplemental jurisdiction over the state law claims.

whether the Act violates Florida's separation of powers doctrine; (2) whether the Act was improperly enacted under the Florida Constitution; and (3) whether the Act infringes upon the Florida Supreme Court's regulatory authority over the practice of law. The fourth issue involves a question of federal constitutional law: whether the Act is unconstitutionally vague or overbroad.[3]

A. State Law Issues

"Substantial doubt about a question of state law upon which a particular case turns should be resolved by certifying the question to the state supreme court." *Jones v. Dillard's, Inc.*, 331 F.3d 1259, 1268 (11th Cir. 2003). Here, substantial doubt exists about the three issues in this case that relate solely to matters of Florida constitutional law.

First, Plaintiffs assert that the Act, or at least certain parts of it, violate Florida's separation of

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[3] To the extent that Plaintiffs also contend that the Act is vague and overbroad under the Florida Constitution, we note that the Florida Supreme Court applies the same principles as exist under the United States Constitution. *See Dep't of Educ. v. Lewis*, 416 So. 2d 455, 461 (Fla. 1982) ("The scope of the protection accorded to freedom of expression in Florida under article I, section 4 is the same as is required under the First Amendment."); *State v. Wershow*, 343 So. 2d 605, 608-09 (Fla. 1977) (applying the same test for vagueness to a challenge brought under both article I, section 9 of the Florida Constitution and the Fifth and Fourteenth Amendments to the United States Constitution).

powers doctrine. They specifically challenge provisions in section 11.045 that authorize designated committees of the Legislature (1) to provide advisory opinions on the applicability and interpretation of relevant provisions of the Act, (2) to investigate any person or lobbying firm alleged to have violated the Act, and (3) to make findings and a recommendation of punishment for ultimate decision by their respective houses. Plaintiffs contend that these provisions, by assigning to the Legislature the power to interpret and enforce the Act as well as the power to adjudicate violations of the Act, unconstitutionally encroach upon powers belonging to the judicial and executive branches of the state government.

On the second issue, Plaintiffs claim that the Act was not validly enacted pursuant to state constitutional provisions governing special sessions.[4] They argue that the Act is invalid because it was not read three times after it was properly introduced by a two-thirds vote; instead, it was read twice before introduction and only once after introduction.

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[4] The relevant provisions of the Florida Constitution are: (1) Article III, Section 3(c)(1), which provides that in a special session convened by the Governor's proclamation, "only such legislative business may be transacted as is within the purview of the proclamation . . . or is introduced by consent of two-thirds of the membership of each house"; and (2) Article III, Section 7, which provides that, to be validly enacted, a bill "shall be read in each house on three separate days, unless this rule is waived by two-thirds vote."

The third issue is whether the Act infringes the Florida Supreme Court's authority to regulate the practice of law in Florida. Relying upon Article V, Section 15 of the Florida Constitution,[5] Plaintiffs contend that the Act, especially its compensation reporting provisions, invades the exclusive jurisdiction of the Florida Supreme Court to regulate the admission of persons to the practice of law and to discipline those admitted. According to Plaintiffs, lobbying by lawyers constitutes the practice of law. Thus, because the Act requires lawyers who lobby on behalf of a client to report the compensation they received, Plaintiffs argue that the Act runs afoul of the rules regulating the Florida Bar. Bar rules forbid lawyers from disclosing confidential client information, including compensation paid by the client, without the client's consent.

Having reviewed all the arguments and the case law, we conclude that the law in Florida is not sufficiently well-established for us to determine with confidence whether the Act is unconstitutional under the state's constitution. In particular, we are uncertain about whether the provisions of the Act authorizing designated committees of the Legislature to issue advisory opinions, to investigate violations of the Act, and to recommend penalties to the Legislature for violations of the Act contravene the Florida

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[5] This provision states, "The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted."

Constitution's separation of powers. We are also uncertain about whether the Florida House of Representatives properly waived the constitutional requirement that a proposed bill be read on three separate days after it has been introduced. In addition, we are uncertain about whether the Act, by regulating lawyer lobbyists, unconstitutionally infringes the Florida Supreme Court's exclusive jurisdiction to regulate the practice of law in the state.

Under the Florida Constitution, this court may certify a question to the Florida Supreme Court if it "is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida." Fla. Const. art. V, § 3(b)(6). Because we have found no such controlling precedent, we certify the following questions to the Florida Supreme Court:[6]

(1) Whether the provisions of section 11.045 that authorize designated committees of the Legislature to issue advisory opinions, to investigate violations of the Act, and to recommend punishment

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[6] Our statement of the certified questions is not intended to restrict the issues considered by the Florida Supreme Court. *Stevens v. Battelle Mem'l Inst.*, 488 F.3d 896, 904 (11th Cir. 2007); *see also Miller v. Scottsdale Ins. Co.*, 410 F.3d 678, 682 (11th Cir. 2005) ("Our phrasing of the certified question is merely suggestive and does not in any way restrict the scope of the inquiry by the Supreme Court of Florida."). We are mindful that "latitude extends to the Supreme Court's restatement of the issue or issues and the manner in which the answers are given." *Stevens*, 488 F.3d at 904 (internal quotation marks omitted).

for approval by the full Legislature violate Florida's separation of powers doctrine.

(2) Whether the Florida House of Representatives validly passed the Act under Article 3, Section 7 of the Florida Constitution, notwithstanding that the bill was not read on three separate days after it was properly introduced.

(3) Whether the Act violates the exclusive jurisdiction of the Florida Supreme Court under Article V, Section 15 of the Florida Constitution by regulating the lobbying activities of lawyers.

B. Federal Law Issue

The remaining issue in this case is whether the Act – on its face – is vague or overbroad in violation of the United States Constitution. Plaintiffs contend that the Act's provisions banning expenditures as well as its compensation reporting provisions are unconstitutionally vague and overbroad. On the issue of vagueness, Plaintiffs argue that statutory terms such as "expenditure" or "direct" and "indirect" are so inadequately defined that a person of common intelligence must guess at their meaning and that, as a result, the Act allows for unbridled discretion in its enforcement.

To overcome a vagueness challenge, a statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited"; and it must "provide explicit standards for those who

apply them" to avoid arbitrary and discriminatory enforcement. *Grayned v. City of Rockford,* 92 S. Ct. 2294, 2298-99 (1972).

We conclude that the Act does not violate due process standards about vagueness. For instance, it clearly provides that an expenditure – which is separately defined in sections 11.045(1)(d) and 112.3215(1)(d) – is unlawful only if it is made by a lobbyist or principal *and* accepted by a government official. Contrary to Plaintiffs' suggestion, the Act cannot reasonably be read to bar all expenditures for lobbying purposes (for example, a cab fare to the capitol). Instead, it only bars those lobbying expenditures that are accepted by a government official. *See* Fla. Stat. §§ 11.045(4)(a), 112.3215(6)(a) (stating that "no lobbyist or principal shall make, directly or indirectly, *and* no member or employee of the legislature" nor any "agency official, member, or employee shall knowingly accept, directly or indirectly, any expenditure" (emphasis added)). In a similar way, we do not regard the term "indirect" as vague: a person of common intelligence would understand that it applies to expenditures or compensation paid through a third party.

In short, the statutory language at issue "provide[s] explicit standards for those who apply them" and "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned,* 92 S. Ct. at 2298-99. As the Supreme Court observed, "we can never expect mathematical certainty from our language." *Id.* at 2300. With this

observation in mind, we cannot conclude that the statutory language Plaintiffs challenge is so vague as to violate the Constitution.

Plaintiffs also contend that the Act's compensation reporting provision is unconstitutionally overbroad because it requires "disclosure of compensation paid to a lobbyist even where that compensation has not been paid for expressly advocating passage or defeat of legislation." A law is overbroad that "does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech." *Thornhill v. State of Alabama,* 60 S. Ct. 736, 742 (1940). The First Amendment doctrine of overbreadth is an exception to the normal rules governing facial challenges. *Virginia v. Hicks,* 123 S. Ct. 2191, 2196 (2003).[7] For the First Amendment, a law is facially invalid if it "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *Hicks,* 123 S. Ct. at 2196 (quoting *Broadrick v. Oklahoma,* 93 S. Ct. 2908, 2918 (1973)). We note, however, the Supreme Court's admonition that application of the overbreadth doctrine is "strong medicine" that should be

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[7] In general, to challenge a statute facially, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 107 S. Ct. 2095, 2100 (1987).

used "sparingly and only as a last resort." *Broadrick*, 93 S. Ct. at 2916.

Plaintiffs do not deny the Legislature's legitimate interest in the public disclosure of compensation paid to a lobbying firm for the purpose of lobbying. They instead contend that the statute sweeps too broadly by requiring the reporting of all compensation paid to lobbyists "irrespective of how the funds are spent." We agree with the district court that Plaintiffs have misconstrued the Act. Contrary to their claim that the Act requires the disclosure of all compensation paid to lobbyists regardless of how the funds are used, the Act actually only requires the reporting of compensation that lobbyists receive "for any lobbying activity." Fla. Stat. §§ 11.045(1)(b), 112.3215(1)(c).

That the compensation reporting provision is limited to compensation received "for any lobbying activity" does not end the matter, however. The Act defines "lobbying" as "influencing or attempting to influence legislative action or nonaction through oral or written communication or an attempt to obtain the goodwill of a member or employee of the Legislature." *Id.* § 11.045(1)(f); *see also id.* § 112.3215(1)(f) (defining "lobbies" as "seeking, on behalf of another person, to influence an agency with respect to a decision of the agency in the area of policy or procurement or an attempt to obtain the goodwill of an agency official or employee"). Plaintiffs argue that lobbying activity, as defined in the Act, encompasses not only direct communications from lobbyists to legislators and state officials (which is undoubtedly a

legitimate object of regulation[8]), but also indirect communications – such as opinion articles, issue advertisements, and letterwriting campaigns – from lobbyists on behalf of their clients to the press and public at large for the purpose of influencing legislation or policy.

We have made clear that the state has a compelling interest "in 'self-protection' in the face of coordinated pressure campaigns" directed by lobbyists. *Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460, 461 (11th Cir. 1996). Also, lobbyist disclosure laws of the sort at issue here allow voters to appraise "the integrity and performance of officeholders and candidates, in view of the pressures they face." *Id.* at 460. We have said that these interests are compelling not only when the pressures to be

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[8] In *United States v. Harriss*, 74 S. Ct. 808 (1954), the Supreme Court upheld the disclosure requirements in the Federal Regulation of Lobbying Act of 1946, which applied to persons who solicit, collect, or receive money or any other thing of value to aid "'[t]he passage or defeat of any legislation by the Congress of the United States'" or "'[t]o influence, directly or indirectly, the passage or defeat of any legislation by the Congress of the United States.'" *Id.* at 812-13 (quoting Section 307 of the Lobbying Act). To avoid constitutional infirmity, the Court construed the disclosure requirements narrowly to cover only those "contributions and expenditures having the purpose of attempting to influence legislation through *direct communication with Congress.*" *Id.* at 815 (emphasis added). In doing so, the Court upheld the statute against First Amendment challenge on the ground that Congress was "not constitutionally forbidden to require the disclosure of lobbying activities" for the purpose of "self-protection." *Id.* at 816.

evaluated by voters and officeholders are "direct," but also when they are "indirect." *See id.* at 461 ("[T]he government interest in providing the means to evaluate these pressures may in some ways be stronger when the pressures are indirect, because then they are harder to identify without the aid of disclosure requirements."); *see also Minn. State Ethical Practices Bd. v. Nat'l Rifle Ass'n of Am.*, 761 F.2d 509, 511-13 (8th Cir. 1985) (upholding a state's interest in applying its reporting requirements to indirect communications between a lobbyist and members of an association for the purpose of influencing specific legislation).

Because the First Amendment allows required reporting of considerably more than face-to-face contact with government officials, we decline to invalidate the Act on its face as substantially overbroad. *See Meggs*, 87 F.3d at 461. Instead, we leave "whatever overbreadth may exist [to] be cured through case-by-case analysis of the fact situations to which [the Act's] sanctions, assertedly, may not be applied." *Broadrick*, 93 S. Ct. at 2918.

III. Conclusion

After reviewing Florida case law, we are uncertain whether the Act violates Florida's separation of powers doctrine, was properly enacted under Florida law, or infringes upon the Florida Supreme Court's jurisdiction. Because these questions are solely issues of state law that should be decided by the Florida

Supreme Court, we certify these questions to the Florida Supreme Court. We do, however, affirm the district court's ruling that the Act is not vague or overbroad under the United States Constitution.

AFFIRMED in part, and QUESTIONS CERTIFIED.

Supreme Court of Florida.

Case No. SC08-791.

March 19, 2009.

FLORIDA ASSOCIATION OF PROFESSIONAL LOBBYISTS, INC., etc., et al. Appellants,

v.

DIVISION OF LEGISLATIVE INFORMATION SERVICES, etc., et al. Appellees.

Certified Question of Law from the United States Court of Appeals for the Eleventh Circuit Case No. 07-10435.

Counsel: Mark Herron, Thomas M. Findley, and Robert J. Telfer, III of Messer, Caparello and Self, P.A., Tallahassee, for Appellants. Bill McCollum, Attorney General, Scott D. Makar, Solicitor General, Louis F. Hubener, Chief Deputy Solicitor General, Tallahassee, and Kenneth W. Sukhia and David P. Healy of the Sukhia Law Group, PLC, Tallahassee, for Appellees.

POLSTON, J.) This case is before the Court for review of questions of Florida law certified by the United States Court of Appeals for the Eleventh Circuit that are determinative of a cause pending in that court and for which there appears to be no controlling precedent.[1]

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[1] We have jurisdiction. *See* art. V, § 3(b)(6), Fla. Const.

Background

The instant case arose after Appellants, the Florida Association of Professional Lobbyists ("FAPL"), initiated a facial challenge of chapter 2005-359, Laws of Florida, currently codified at sections 11.045 and 112.3215, Florida Statutes (2008), which regulates and disciplines lobbyists.[2]

The case was originally filed in circuit court, Second Circuit, Leon County, but was removed to federal district court in the Northern District of Florida. The Northern District granted summary judgment to the defendants, Division of Legislative Information Services, et al. (the "Division"), on all counts, and FAPL appealed to the Eleventh Circuit. The Eleventh Circuit affirmed the Northern District on the federal question presented and held that the Act is not unconstitutionally vague or overly broad under federal constitutional standards. *Fla. Ass'n of Prof'l Lobbyists v. Div. of Legislative Info. Servs.*, 525 F.3d 1073, 1080-81 (11th Cir. 2008). However, it also stated that "the law in Florida is not sufficiently well-established for us to determine with confidence whether the act is unconstitutional under the state's constitution." *Id.* at 1077. Consequently, it certified three questions of Florida law to this Court, specifically:

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[2] The challenged legislation came about through the introduction and passage of Senate Bill 6-B during the 2005 special legislative session. Hereinafter, it will be referred to as "the Act" or "SB 6-B."

(I) WHETHER THE ACT VIOLATES FLORIDA'S SEPARATION OF POWERS DOCTRINE;

(II) WHETHER THE ACT WAS VALIDLY PASSED BY THE LEGISLATURE ACCORDING TO THE REQUIREMENTS OF THE FLORIDA STATE CONSTITUTION; and

(III) WHETHER THE ACT INFRINGES ON THE FLORIDA SUPREME COURT'S EXCLUSIVE JURISDICTION TO REGULATE LAWYERS AND THE PRACTICE OF LAW.

The Eleventh Circuit set out the particulars of the Act as follows:

> According to the Act, "no lobbyist or principal shall make, directly or indirectly, *and* no member or employee of the legislature," Fla. Stat. § 11.045(4)(a) (emphasis added), nor any "agency official, member, or employee shall knowingly accept, directly or indirectly, any expenditure." *Id.* § 112.3215(6)(a).[n.1] Given the use of the conjunctive "and," the Act does not bar all lobbying expenditures; instead, it bars only those expenditures that are made for lobbying purposes *and* are accepted by an official.
>
> [n.1] The term "expenditure" is defined as "a payment, distribution, loan, advance, reimbursement, deposit, or anything of value

made by a lobbyist or principal for the purpose of lobbying." Fla. Stat. §§ 11.045(1)(d), 112.3215(1)(d).

The Act also includes a disclosure provision that requires lobbying firms to file quarterly statements reporting the total compensation paid or owed by their "principals" – that is, their clients. *Id.* §§ 11.045(3)(a)1.c, 112.3215(5)(a)1.c. Lobbying firms must also disclose the full name, business address, and telephone number of each principal, as well as the total compensation that each principal paid or owed to the lobbying firm. *Id.* §§ 11.045(3)(a)2, 112.3215(5)(a)2.

In addition to the disclosure provision, the Act has enforcement provisions that allow for audits as well as for the filing of sworn complaints. *Id.* §§ 11.045(7)-(8), 112.3215(8)-(10). For legislative lobbying, every sworn complaint or audit indicating a possible violation (with the exception of an untimely report) is subject to investigation by designated committees of either house of the Legislature. *Id.* § 11.045(7). If a violation is found, the committee must report its findings, together with a recommended penalty, to either the President of the Senate or Speaker of the House, as appropriate. *Id.* The President of the Senate or Speaker of the House then submits the committee report and recommendation to their respective chamber; and a final determination is made by a majority vote of the members. *Id.* Authorized penalties include "a fine of not

more than $5,000, reprimand, censure, probation, or prohibition from lobbying for a period of time not to exceed 24 months." *Id.*

For executive lobbying, every sworn complaint or audit indicating a possible violation (with the exception of an untimely report) is subject to investigation by the Commission on Ethics. *Id.* § 112.3215(8)(a), (c). If the Commission finds probable cause of a violation, then it submits a report to the Governor and the Cabinet for a determination of the penalty. *Id.* § 112.3215(9), (10). Authorized penalties include reprimand, censure, or a prohibition on lobbying any agency for a period not to exceed two years. *Id.* § 112.3215(10). But, "[i]f the violator is a lobbying firm, the Governor and Cabinet may also assess a fine of not more than $5,000." *Id.*

Fla. Ass'n of Prof'l Lobbyists v. Div. of Legislative Info. Servs., 525 F.3d 1073, 1075-76 (11th Cir. 2008).

Analysis

For the following reasons, we find that the Act (I) does not violate Florida's separation of powers doctrine; (II) was validly enacted by the Florida Legislature; and (III) does not infringe on the Florida Supreme Court's jurisdiction to regulate lawyers or the practice of law.

I. The Act Does Not Violate Florida's Separation of Powers Doctrine

FAPL argues that, in enacting SB 6-B and thereby giving itself the power to issue advisory opinions, investigate violations, and recommend punishment for infractions of the Act that it alone can approve, the Legislature has directly encroached on the powers of the judicial and executive branches. We disagree.

"The [separation of powers] doctrine encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power." *Chiles v. Children A, B, C, D, E, & F,* 589 So. 2d 260, 264 (Fla. 1991) (citation omitted). Because improper delegation of powers is not implicated here, we only address the issue of encroachment.

The Florida Constitution does not explicitly prohibit any of the functions set out in the Act. Although the constitution does not give the Legislature the exclusive power to discipline lobbyists, it also does not prevent it from doing so. As this Court has noted, "the state constitution does not exhaustively list each branch's powers." *Fla. House of Representatives v. Crist,* 990 So. 2d 1035, 1045 (Fla. 2008). Rather,

> the powers of the respective branches "are those so defined . . . or such as are inherent or so recognized by immemorial governmental usage, and which involve the exercise of primary and independent will, discretion,

> and judgment, subject not to the control of another department, but only to the limitations imposed by the state and federal Constitutions." [Each branch has] "the inherent right to accomplish all objects naturally within the orbit of that department, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the constitution."

Id. at 611 (citation omitted) (quoting *State v. Atlantic Coast Line R.R.*, 47 So. 969, 974 (Fla. 1908); *Sun Ins. Office v. Clay*, 133 So. 2d 735, 742 (Fla. 1961)). Therefore, since the regulation, discipline, and licensing of lobbyists is not subject to the control of any branch or office, the Legislature is not prohibited from using its own discretion and judgment to accomplish the task. *See State v. Palmer*, 791 So. 2d 1181, 1183 (Fla. 1st DCA 2001) ("[A] branch of government is prohibited from exercising a power only when that power has been constitutionally assigned exclusively to another branch; and the separation of powers doctrine does not contemplate that every governmental activity must be classified as belonging exclusively to a single branch."). Accordingly, we answer the first question in the negative and find that the Act does not violate Florida's separation of powers doctrine.

II. The Act Was Validly Enacted by the Florida Legislature

FAPL also claims that the Act was not validly enacted by the Legislature according to the procedural

requirements of the Florida Constitution. We disagree.

Two constitutional provisions are relevant here. First, article III, section 3 provides in part that, during a special session, the only legislative business that may be transacted is that business which is within the purview of the governor's proclamation or that which is introduced by consent of two-thirds of the membership of each house. *See* Art. III, § 3(c)(1), Fla. Const. Also relevant is article III, section 7, which provides the procedure for valid enactment of a bill. It states:

> Any bill may originate in either house and after passage in one may be amended in the other. It shall be read in each house on three separate days, unless this rule is waived by two-thirds vote; provided the publication of its title in the journal of a house shall satisfy the requirement for the first reading in that house. On each reading, it shall be read by title only, unless one-third of the members present desire it read in full. On final passage, the vote of each member voting shall be entered on the journal. Passage of a bill shall require a majority vote in each house. Each bill and joint resolution passed in both houses shall be signed by the presiding officers of the respective houses and by the secretary of the senate and the clerk of the house of representatives during the session or as soon as practicable after its adjournment sine die.

Art. III, § 7, Fla. Const.

After reviewing the journals of both chambers, we find that all the rules and requirements for enacting a bill during special session were followed. On December 5, 2005, SB 6-B was formally introduced in the Florida Senate after it received the required two-thirds vote of the membership. It was also read for the first time. *Fla. S. Jour.* 2 (Spec. Sess. 2005). Then, on December 7, 2005, the rules were waived and it was read for the second and third times. Thereafter, SB 6-B was passed, the vote was recorded, it was ordered engrossed, and it was certified to the House. *Fla. S. Jour.* 33, 42 (Spec. Sess. 2005). In the Florida House, on December 5, 2005, House Bill 63-B, a bill relating to the registration and reporting requirements for lobbyists, was formally introduced after receiving the required two-thirds vote. *See Fla. H.R. Jour.* 3 (Spec. Sess. 2005). Then, on December 8, 2005, SB 6-B was read three times in the House after the rules were waived; it was also formally introduced in the House by a two-thirds vote after the bill's second reading; its passing vote was properly recorded in the House Journal; and it was enrolled, signed, and filed. *Fla. H.R. Jour.* 45 (Spec. Sess. 2005); *see also State v. Kaufman,* 430 So. 2d 904, 905 (Fla. 1983) ("[W]hen enrolled, signed, and filed, acts of the legislature are prima facie valid.").

FAPL claims that the Act was not properly enacted because SB 6-B was read twice in the House before its formal introduction and only once afterwards. It asserts that the three-readings requirement, when executed in this manner, is insufficient to

satisfy the constitutional requirements for enacting legislation. We find FAPL's argument unpersuasive because SB 6-B did not require a formal introduction in the House. Rather, since HB 63-B, a similar subject bill, had already been formally introduced in the House by the requisite two-thirds vote, no further introduction of SB 6-B was necessary because it fell within the purview of the subject matter of HB 63-B. Therefore, the passage of SB 6-B constituted the transaction of "legislative business" which was "introduced by consent of two-thirds of the membership of each house." Art. III, § 3(c)(1), Fla. Const.[3] Accordingly, we answer the second question affirmatively and find that SB 6-B was validly enacted by the Florida Legislature.

III. The Act Does Not Infringe on the Florida Supreme Court's Jurisdiction to Regulate Lawyers or the Practice of Law

FAPL also argues that lobbying is part of the general practice of law and that the Act is unconstitutional because it regulates and disciplines lawyers who work as lobbyists and thereby encroaches on the jurisdiction of this Court. We disagree.

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[3] We need not address, and specifically do not rule on, whether the two-thirds vote with respect to SB 6-B after its second reading in the House would have been independently sufficient to satisfy the constitutional requirement.

Section 112.3215, Florida Statutes (2008), which pertains to lobbying before the executive branch, defines "lobbies" and "lobbyist" as follows:

> (f) "Lobbies" means seeking, on behalf of another person, to influence an agency with respect to a decision of the agency in the area of policy or procurement or an attempt to obtain the goodwill of an agency official or employee. "Lobbies" also means influencing or attempting to influence, on behalf of another, the Constitution Revision Commission's action or nonaction through oral or written communication or an attempt to obtain the goodwill of a member or employee of the Constitution Revision Commission.
>
> . . . .
>
> (h) "Lobbyist" means a person who is employed and receives payment, or who contracts for economic consideration, for the purpose of lobbying, or a person who is principally employed for governmental affairs by another person or governmental entity to lobby on behalf of that other person or governmental entity. *"Lobbyist" does not include a person who is:*
>
> 1. *An attorney,* or any person who represents a client in a judicial proceeding or in a formal administrative proceeding conducted pursuant to chapter 120 or any other formal hearing before an agency, board, commission, or authority of this state.

(Emphasis added.)

Similarly, section 11.045(1)(f), Florida Statutes (2008), defines legislative lobbying as "influencing or attempting to influence legislative action or nonaction through oral or written communications or an attempt to obtain goodwill of a member or employee of the Legislature." *See also Black's Law Dictionary* 845 (5th ed. 1979) (defining "lobbying" as "[a]ll attempts including personal solicitation to induce legislators to vote in a certain way or to introduce legislation").

On the other hand, this Court has explained that "the performance of services in representing another before the courts is the practice of law." *State ex rel. Fla. Bar v. Sperry,* 140 So. 2d 587, 591 (Fla. 1962), *vacated on other grounds,* 373 U.S. 379 (1963). Additionally, as the Act expressly acknowledges, the practice of law includes representing clients in administrative proceedings under chapter 120, Florida Statutes, and representing clients in formal hearings before agencies, boards, and commissions. *See* § 112.3215(1)(h)(1), Fla. Stat. (2008). The practice of law also includes "the giving of legal advice" and "the preparation of legal instruments." *Sperry,* 140 So. 2d at 591; *see also Fla. Bar v. Neiman,* 816 So. 2d 587, 596 (Fla. 2002).

Given the differences between the two activities, we conclude that lobbying as defined by the Act does not constitute the practice of law. Accordingly, we find that lobbyists, who may also be lawyers when engaged in lobbying activities, may be regulated and disciplined for their actions or inactions as prescribed

by the Act. We also find that those regulations and disciplinary actions described in the Act do not infringe on this Court's jurisdiction to regulate and discipline lawyers, who may also be lobbyists, in matters relating to their practice of law.

Conclusion

For the reasons stated above, we answer the first and third questions in the negative and the second question affirmatively and hold that the Act (I) does not violate Florida's separation of powers doctrine; (II) was validly enacted by the Florida Legislature; and (III) does not infringe on the Florida Supreme Court's jurisdiction to regulate lawyers or the practice of law. (QUINCE, C.J., and PARIENTE, LEWIS, CANADY, and LABARGA, JJ., concur.)

United States District Court, N.D. Florida,
Tallahassee Division.

FLORIDA ASSOCIATION OF PROFESSIONAL LOBBYISTS, INC., a Florida not for profit corporation; Spearman Management Company, a Florida corporation; Guy M. Spearman III, a natural person; Ronald L. Book, P.A., a Florida professional association; and Ronald L. Book, a natural person, Plaintiffs,

v.

DIVISION OF LEGISLATIVE INFORMATION SERVICES OF the FLORIDA OFFICE OF LEGISLATIVE SERVICES, a Florida state agency; The Florida Commission on Ethics, an independent constitutional commission; Tom Lee, as President of the Florida Senate; and Allan Bense, as Speaker of the Florida House of Representatives, Defendants.

No. 4:06cv123-SPM/ WCS.

Dec. 28, 2006.

Barry Rodney Davidson, Jamie L. Zysk, Thomas R. Julin, Hunton & Williams LLP, Miami, FL, Mark Herron, Thomas Marshall Findley, Messer Caparello & Self PA, Tallahassee, FL, for Plaintiffs.

Louis F. Hubener, Denis Allen Dean, Attorney General State of FL, Michael Pearce Dodson, Micheal Pearce Dodson Esq, Kenneth Wayne Sukhia, Conwell Sukhia & Kirkpatrick PA, Tallahassee, FL, for Defendants.

ORDER GRANTING SUMMARY JUDGMENT

STEPHAN P. MICKLE, United States District Judge.

Plaintiffs are a lobbying organization, lobbying firms, and individuals who engage in lobbying activities. They are challenging the facial validity of an Act passed by the Florida Legislature during the December 2005 special session. The Act, chapter 2005-359, Laws of Florida, codified at sections 11.045 and 112.3215, regulates legislative and executive lobbying.

One of the main features of the Act is an expenditure[1] provision that prohibits gifts and payments by lobbyists to officials. The Act provides that "no lobbyists or principal shall make, directly or indirectly, and no member or employee of the of the legislature" nor "any agency official, member or employee shall knowingly accept, directly or indirectly, an expenditure." § 11.045(4)(a) and § 112.3215(6)(a), Fla. Stat. (emphasis supplied). The use of the conjunctive "and" in the Act makes clear that the prohibition on expenditures is not a general prohibition on all lobbying expenditures. The prohibition applies only to expenditures that are made for lobbying purposes and accepted by an official.

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[1] The term "expenditure" is defined as "a payment, distribution, loan, advance, reimbursement, deposit, or anything of value made by a lobbyist or principal for the purpose of lobbying." § 11.045(4)(a) and § 112.3215(6)(a), Fla. Stat.

Another feature of the Act is a disclosure provision that requires lobbying firms to file quarterly reports designating the total compensation owed to the lobbying firm from principals. § 11.045(3)(a)1.c. and § 112.3215(5)(a)1.c., Fla. Stat. In addition, lobbying firms must disclose the compensation owed by each principal. The reports must include the full name, business address, and telephone number of each principal, and the total compensation that each principal provided or owed to the lobbying firm. § 11.045(3)(a)2.b. and § 112.3215(5)(a)2.b., Fla. Stat.

The Act contains enforcement provisions that allows for audits and the filing of sworn complaints. § 11.040(6), § 11.045, and § 112.3215, Fla. Stat. For legislative lobbying, every sworn complaint or audit indicating a possible violation (other than a late filed report) is subject to investigation by designated committees for each house. § 11.045(7), Fla. Stat. A committee's recommendation for penalty is reported to the President of the Senate or Speaker of the House and submitted to the majority of the appropriate house for a final determination. § 11.045(7), Fla. Stat. Authorized penalties include "a fine of not more than $5,000, reprimand, censure, probation, or prohibition of lobbying for a period of time not to exceed 24 months." § 11.045(7), Fla. Stat. For executive lobbying, every sworn complaint or audit indicating a possible violation (other than a late filed report) is subject to investigation by the Commission on Ethics. §§ 112.3215(8)(a) and (c), Fla. Stat. If the Commission on Ethics finds probable cause that a

violation occurred, it submits a report to the Governor and Cabinet for a determination and imposition of a penalty. §§ 112.3215(9) and (10), Fla. Stat. Authorized penalties include reprimand, censure, or a prohibition on lobbying all agencies for a period not to exceed 2 years. § 112.3215(9), Fla. Stat. "If the violator is a lobbying firm, the Governor and Cabinet may also assess a fine of not more than $5,000." § 112.3215(10), Fla. Stat.

Plaintiffs challenge the Act on several fronts. They contend that the Act was not validly passed by the legislature because the Act was not read three times after it was introduced by the House at the special session. Plaintiffs contend that the Act usurps the constitutional authority of the Florida Supreme Court to regulate the practice of law. Plaintiffs content that expenditure restrictions, disclosure requirements, and enforcement provisions violate constitutional guarantees of free speech and petition, due process, equal protection, privacy, and separation of powers. Through this lawsuit, Plaintiffs seek an injunction to prevent enforcement of the Act. They also seek a declaration of their obligations under the Act in the event the Court finds that the Act is constitutional.

In a prior order (doc. 80), the Court denied Plaintiffs' motion for preliminary injunction and motion for summary judgment. Defendants have since filed a motion for summary judgment (docs. 85, 89, and 90). There are no disputed issues of material fact

and Defendants are entitled to judgment as a matter of law.

1. Valid Enactment

Contrary to Plaintiffs' arguments, the Act was properly introduced as a topic for the December 2005 special session[2]. The three-day reading rule[3] was properly waived.

On the opening day by two-thirds vote, the legislature introduced HB 63-B, an "act relating to lobbying," dealing expressly with compensation reporting and expenditure limitations, and "any companion measures that may be passed by the Senate." Journal of the House, Special Session B, 2005 at 3. From that point forward, the House could have introduced and considered any bill relative to the legislative business of lobbying regulation, not just HB 63-B. A separate introduction was not necessary.

Thereafter, when the House went on to consider the bill that became the Act, SB 6B, "the rules were waived and SB 6B was read a third time by title." *Id.*

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[2] The Florida Constitution, Article III, section 3(c)(1) provides that in a special session convened by the Governor's proclamation, "only such legislative business may be transacted as within the purview of the proclamation . . . or is introduced by consent of two-thirds of the membership of each house."

[3] The Florida Constitution, Article III, section 7 provides that a bill "must be read in each house on three separate days, unless this rule is waived by two-thirds vote."

It was not necessary to read the bill on three separate days, or even to read the title three times thereafter, because the rules were waived.

"[W]hen enrolled, signed, and filed, acts of the legislature are prima facie valid." *State v. Kaufman*, 430 So.2d 904, 905 (Fla.1983). "Courts have no substantive power to review and nullify legislative proceedings but can determine whether the legislative journals show that a statute has been duly enacted." *Id.* (citations omitted). The Journal of the House shows that two-thirds membership voted to consider lobbying regulation as a matter of legislative business during the special session. The Journal of the House also shows that the three-day reading rule for SB 6B was waived. The Act was thus passed in accordance with constitutional requirements. Defendants are entitled to judgment as a matter of law on these claims.

2. Regulation of the Practice of Law

Although the Florida Constitution, Article V, section 15, vests the Florida Supreme Court with "exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted[,]" the Florida Supreme Court has recognized that the legislature may enact a law "'that affects the legal profession just as it can with regard to other occupations and professions." *Pace v. State*, 368 So.2d 340, 345 (Fla.1979). The Act does not overstep the legislature's authority as recognized in

Pace. Any impact that the Act has on the practice of law is incidental to legitimate lobbying regulation. Defendants are entitled to judgment as a matter of law on these claims.

3. Limited Nature of Expenditure Restriction

Contrary to Plaintiffs' argument, the Act does not impose an absolute ban on all lobbying expenditures. The Act provides that "no **lobbyists** or principal shall make, directly or indirectly, and no member or employee of the of the legislature" nor "any agency official, member or employee shall knowingly accept, directly or indirectly, an expenditure." § 11.045(4)(a) and § 112.3215(6)(a), Fla. Stat. (emphasis supplied). The use of the conjunctive "and" in the Act makes clear the prohibition on expenditures applies only to expenditures that are made and accepted. The Act's plain language shows that it amounts to no more than a ban on gifts and payments to officials.

Plaintiffs cannot show that the Act's expenditure restrictions are facially unconstitutional. Accordingly, Defendants are entitled to judgment as a matter of law on these claims.

4. Vagueness and Overbreadth

A regulation is void on its face if persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). Terms

used in the Act are defined with reasonable clarity. The enforcement provisions in the Act, furthermore, provide adequate standards. Discretion under the act to waive a requirement or penalty is tied to a good cause standard. See §§ 11.045(3)(e)5. and 6. and §§ 112.3215(5)(e)5., Fla. Stat. "'[G]ood cause' is a reasonable and intelligible standard that does not force people of general intelligence to guess at its meaning and therefore is not 'void for vagueness.'" *McCallum v. City of Biddeford,* 551 A.2d 452, 453 (Me.1988).

"[E]ven though marginal cases could be put where doubts might arise[,]" the Act should not be struck down for vagueness. *United States v. Harriss,* 347 U.S. 612, 618 (1954). Administrative interpretation and enforcement is relevant to Plaintiffs' facial challenge of the Act. *Ward v. Rock Against Racism,* 491 U.S. 781, 795-96 (1982). Plaintiffs may obtain an advisory opinion to address specific questions about the applicability and interpretation of the Act. § 11.045(5) and § 112.3215(11), Fla. Stat. The availability of an advisory opinion weighs against a finding of vagueness. *See Comm'n on Indep. Colleges and Universities v. New York Temp. State Comm'n on Regulating of Lobbying,* 534 F.Supp. 489, 502-03 (N.D.N.Y.1982). Plaintiffs may also make as applied challenges to the Act or challenge any part of the Act that "factual development shows can never be applied constitutionally." *Florida League of Professional Lobbyists, Inc. v. Meggs,* 87 F.3d 457, 461 (11th Cir.1996). At this point, however, the Court finds no basis to strike the Act down as void for vagueness.

Plaintiffs also argue that the Act is overbroad[4] because it requires lobbying firms to report all compensation, irrespective of whether the compensation is related to lobbying activities. Plaintiffs' overbreadth argument is based on a flawed reading of the Act. The Act specifies that the compensation required to be reported is "for any lobbying activity." § 11.045(1)(b) and § 112.3214(1)(c), Fla. Stat. Lobbying firms need only report compensation earned for lobbying activity.[5] Moreover, the Act does not constitute an overbroad restriction on the Plaintiffs' exercise of freedom of speech because "'[a]pplication of the burdens of registration and disclosure of receipts and expenditures to lobbyists does not substantially interfere with the ability of the lobbyist to raise his

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[4] A law will be struck down as overbroad if "it does not aim specifically at evils within the allowable area of government control . . . but sweeps within its ambit other activities that constitute an exercise of freedom of speech. . . ." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

[5] For legislative branch lobbying, the term "lobbying" is defined as "influencing or attempting to influence legislative action or nonaction through oral or written communication or an attempt to obtain the goodwill of a member or employee of the Legislature." § 11.045(1)(f), Fla. Stat. For executive branch lobbying, the term "'[l]obbies' means seeking on behalf of another person, to influence an agency with respect to a decision of the agency in the area of policy or procurement or an attempt to obtain the goodwill of an agency official or employee. 'Lobbbies' also means influencing or attempting to influence, on behalf of another, the Constitution Revision Commission's action or nonaction through oral or written communication or attempt to obtain the goodwill of a member or employee of the Constitution Revision Commission." § 112.3215(1)(f), Fla. Stat.

voice.'" *Meggs,* 87 F.3d at 460 (quoting *Fair Political Practices Comm'n v. Superior Ct. of Los Angeles,* 599 P.2d 46, 54 (1979)). Defendants are entitled to judgment as a matter of law on Plaintiffs' overbreadth and vagueness claims.

5. Equal Protection

Plaintiffs cannot reasonably argue "that those who for hire attempt to influence legislation or who collect or spend funds for that purpose," *Harriss,* 347 U.S. at 625, are similarly situated with other citizens who petition the government. The state has a compelling interest in imposing regulations on paid lobbyists. *Meggs,* 87 F.3d at 462 (recognizing compelling interest of state of Florida in lobbying regulation). "[T]o maintain the integrity of a basic governmental process[,]" the government is entitled to collect information about "who is being hired, who is putting up the money, and how much." *Harriss,* 347 U.S. at 625. The burdens imposed by the Act on paid lobbyists do not violate equal protection principals. Defendants are entitled to judgment as a matter of law on Plaintiffs' equal protection claims.

6. Privacy

Plaintiffs's privacy arguments under Article I, section 23 of the Florida Constitution and the right to privacy recognized in the United States Constitution fail as a matter of law because the privacy rights protect natural persons.

The compensation disclosure requirement of the Act applies only to "lobbying firms." § 11.045(3) and § 112.3214(5), Fla. Stat. A lobbying firm is a "business entity." § 11.045(1)(g) and § 112.3214(1)(g), Fla. Stat. The individual plaintiffs in this case conduct their lobbying activity through lobbying firms. Plaintiff Book is an attorney and lobbyist whose firm is a professional association. Plaintiff Spearman's lobbying firm is a corporation. Lobbying firms have no right to privacy under the Florida Constitution because the right to privacy "is a personal one, inuring solely to individuals." *Alterra Healthcare Corp. v. Estate of Francis Shelley,* 827 So.2d 936, 941 (Fla.2002). Under the United States Constitution, the right to privacy extends only to such fundamental interests as marriage, procreation, family relationships, and the rearing and education of children. *Carey v.. Population Serv. Int'l,* 431 U.S. 678, 684-85 (1977). "[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy." *California Bankers Ass'n v. Shultz,* 416 U.S. 21, 65 (1974). Defendants are entitled to judgment as a matter of law on Plaintiffs' privacy claims.

7. Enforcement Provisions

Plaintiffs' arguments that the Act's enforcement provisions violates the right to a jury trial and due process and the separation of powers must fail. Courts have routinely held that no right to jury trial exists in civil administrative proceedings, including professional disciplinary proceedings akin to this

case. *See State ex rel. Kehoe v. McRae,* 38 So. 605 (Fla.1905) (disbarment); *State ex rel. De Gaetani v. Driskell,* 190 So. 461 (Fla.1939) (revoking medical license). Due process is satisfied in proceedings before boards or commissions "if the accused is informed with reasonable certainty of the nature and cause of the accusation against him, has reasonable opportunity to defend against attempted proof of such charges, and the proceedings are conducted in a fair and impartial manner." *Hadley v. Dep't. of Admin., Career Serv. Comm'n,* 411 So.2d 184, 187 (Fla.1982). The Act satisfies these requirements.

With regard to Plaintiffs' separation of powers argument, the Florida Constitution provides that "[c]ommissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the function of their offices." Art. V, § 1, Fla. Const. The Act does not unlawfully delegate "the uniquely legislative power of determining the nature and extent of [civil penalties] which may be assessed," *Florida League of Cities, Inc. v. Administration Comm'n,* 586 So.2d 405, 410 (Fla. 1st Dist.Ct.App.1991), because it constrains the final decisionmaker to choose between available sanctions if a violation is found. Furthermore, to the extent the Act fails to provide for judicial review, a declaration concerning the constitutionality of the Act as applied or some other form of review may nevertheless be available. *See Nelson v. Lindsey,* 151 So.2d 131 (Fla.1942) (recognizing authority of the court to conduct appropriate judicial review, regardless of any

specifically provided method of appeal). Accordingly, the Act does not violate Plaintiffs' rights to jury trial, due process, or principles of separation of powers. Defendants are entitled to judgment as a matter of law on these claims.

8. Declaration of Rights

As their final claim, Plaintiffs seek a declaration of their obligations under the Act in the event the Court rejects their facial challenge. Before Plaintiffs may properly seek a declaratory judgment, they should seek an advisory opinion regarding the Acts' applicability to differing factual scenarios, as provided by § 11.045(5) and § 112.3215(11), Fla. Stat. *Florida Marine Fisheries Comm'n v. Pringle,* 736 So.2d 17, 20 (Fla. 1st Dist.Ct.App.1999). Administrative interpretation and enforcement is relevant to the facial validity of the Act. *Ward v. Rock Against Racism,* 491 U.S. 781, 795-96 (1982). "[H]ypothetical borderline situations" are not an appropriate basis for ruling on the constitutionality of fact-based challenges that may arise in the future. *Meggs,* 87 F.3d at 461 (quoting *Harriss,* 347 U.S. at 626).

9. Conclusion

Plaintiffs are not entitled to relief on their various challenges to the Act. There are no disputed issues of material fact and Defendants are entitled to judgment as a matter of law. Accordingly, it is

ORDERED AND ADJUDGED:

1. Defendants' motions for summary judgment (docs. 85, 89, and 90) are granted.

2. The clerk shall enter judgment in favor of Defendants and against Plaintiffs on all claims.

DONE AND ORDERED.

United States District Court, N.D. Florida, Tallahassee Division.

FLORIDA ASSOCIATION OF PROFESSIONAL LOBBYISTS, INC., a Florida not for profit corporation; Spearman Management Company, a Florida corporation; Guy M. Spearman III, a natural person; Ronald L. Book, P.A., a Florida professional association; and Ronald L. Book, a natural person, Plaintiffs,

v.

DIVISION OF LEGISLATIVE INFORMATION SERVICES OF THE FLORIDA OFFICE OF LEGISLATIVE SERVICES, a Florida state agency; the Florida Commission on Ethics, an independent constitutional commission; Tom Lee, as President of the Florida Senate; and Allan Bense, as Speaker of the Florida House of Representatives, Defendants.

No. 4:06CV123-SPM/WCS.

May 12, 2006.

Barry Rodney Davidson, Jamie L. Zysk, Thomas R. Julin, Hunton & Williams LLP, Miami, FL, Mark Herron, Messer Caparello & Self Pa, Tallahassee, FL, for Plaintiffs.

Michael Pearce Dodson, General Counsel-Office of Legislative Svcs., The Florida Legislature, Christopher M. Kise, Attorney General State of FL, Kenneth Wayne Sukhia, Conwell Sukhia & Kirkpatrick PA, Tallahassee, FL, for Defendants.

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION AND FOR SUMMARY JUDGMENT

MICKLE, District Judge.

"Florida, like every other state in the union, has enacted legislation regulating the conduct of those who 'lobby' the state's legislative or executive officials." *Florida League of Professional Lobbyists, Inc. v. Meggs,* 87 F.3d 457, 458 (11th Cir.1996). This case presents a challenge to a new lobbying law, chapter 2005-359, Laws of Florida, codified at sections 11.045 and 112.3215, Florida Statutes (the "Act"). The Florida Legislature passed the Act in a special session in December 2005.

The Act contains parallel provisions regulating legislative branch lobbying (§ 11.045, Fla.Stat.) and executive branch lobbying (§ 112.3215, Fla.Stat.). Two main features of the Act concern expenditure restrictions and disclosure requirements.

With regard to expenditures restrictions, the Act provides that "no lobbyists or principal shall make, directly or indirectly, and no member or employee of the of the legislature" nor "any agency official, member or employee shall knowingly accept, directly or indirectly, an expenditure." § 11.045(4)(a) and § 112.3215(6)(a), Fla. Stat. "'Expenditure' means a payment, distribution, loan, advance, reimbursement, deposit, or anything of value made by a lobbyist or principal for the purpose of lobbying." § 11.045(4)(a) and § 112.3215(6)(a), Fla. Stat.

With regard to the disclosure requirements, lobbying firms are required by the Act to file quarterly reports designating the total compensation owed to the lobbying firm from principals in "the following categories: $0, $1 to $49,999; $50,000 to $99,999; $100,000 to $249,999; $250,000 to $499,999; $500,000 to $999,999; $1 million or more." § 11.045(3)(a)1.c. and § 112.3215(5)(a)1.c., Fla. Stat. In addition, lobbying firms must also break down the total compensation amount by each principal. The reports must include the full name, business address, and telephone number of each principal, and the total compensation that each principal provided or owed to the lobbying firm in "the following categories: $0; $1 to $9,999; $10,000 to $19,900; $20,000 to $29,999; $30,000 to $39,999; $40,000 to $49,999; or $50,000 or more. If the category '$50,000 or more' is selected, the specific dollar amount of compensation must be reported, rounded up or down to the nearest $1,000." § 11.045(3)(a)2.b. and § 112.3215(5)(a)2.b., Fla. Stat.

Lobbying firms' compensation records may be subpoenaed for audit, "and such subpoena may be enforced in circuit court." § 11.045(2)(e) and § 112.3215(5)(g), Fla. Stat. A Legislative Auditing Committee, composed of five members of the Senate and five members of the House, are required to oversee an annual random audit, to be conducted by an independent audit contractor, of three percent of all legislative branch lobbying firms and a random sample of three percent of all executive branch lobbying firms. § 11.040(6), Fla. Stat. "All audit

reports of legislative lobbying firms . . . [must be] delivered to the President of the Senate and Speaker of the House of Representatives for their respective review and handling." § 11.040(6)(i), Fla. Stat. "All audit reports of executive branch lobbyists . . . [must be] delivered by an auditor to the Commission on Ethics." § 11.040(6)(i), Fla. Stat.

For legislative lobbying, every sworn complaint or audit indicating a possible violation, other than a late filed report, is subject to investigation by designated committees for each house. § 11.045(7), Fla. Stat. A committee's recommendation for penalty is reported to the President of the Senate or Speaker of the House and submitted to the majority of the appropriate house for a final determination. § 11.045(7), Fla. Stat. Authorized penalties include "a fine of not more than $5,000, reprimand, censure, probation, or prohibition of lobbying for a period of time not to exceed 24 months." § 11.045(7), Fla. Stat.

For executive lobbying, every sworn complaint or audit indicating a possible violation, other than a late filed report, is subject to investigation by the Commission on Ethics. §§ 112.3215(8)(a) and (c), Fla. Stat. If the Commission on Ethics finds probable cause that a violation occurred, it submits a report to the Governor and Cabinet for a determination and imposition of a penalty. §§ 112.3215(9) and (10), Fla. Stat. Authorized penalties include reprimand, censure, or a prohibition on lobbying all agencies for a period not to exceed 2 years. § 112.3215(9), Fla. Stat. "If the violator is a lobbying firm, the Governor and Cabinet

may also assess a fine of not more than $5,000." § 112.3215(10), Fla. Stat.

Plaintiffs are a lobbying organization, lobbying firms, and individuals who engage in lobbying activities. As their first argument, Plaintiffs contend that the Act was not validly enacted because it was not read three times after it was introduced by the House at the special session. Next Plaintiffs contend that the Act usurps the constitutional authority of the Florida Supreme Court to regulate the practice of law. Plaintiffs then allege that expenditure restrictions, disclosure requirements, and enforcement provisions are unconstitutional on a multitude of grounds, including free speech and petition, due process, equal protection, privacy, and separation of powers. They seek a preliminary injunction to enjoin enforcement of the Act. They also seek entry of final summary judgment in their favor.

I. Plaintiffs' Burden

Plaintiffs have the burden to demonstrate that they are entitled to a preliminary injunction by showing (1) a substantial likelihood of success on the merits, (2) irreparable injury if the injunction were not granted, (3) that the threatened injury outweighs any harm an injunction may cause the defendant, and (4) that granting the injunction will not be adverse to the public interest. *Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1246-47 (11th Cir.2002). The burden on

summary judgment is even higher. Plaintiffs must demonstrate that "as a matter of law" final judgment in the case should be entered in their favor. Fed.R.Civ.P. 56(c).

II. No Substantial Likelihood of Success on the Merits

A. Valid enactment

Plaintiffs contend that the Act was not validly enacted because it was not read three times after it was introduced by the House at the special session. Their argument implicates two constitutional provisions. First, Article III, section 3(c)(1) provides that in a special session convened by the Governor's proclamation, "only such legislative business may be transacted as within the purview of the proclamation . . . or is introduced by consent of two-thirds of the membership of each house." Art. III, § 3(c)(1), Fla. Const. Second, to be validly enacted, Article III, section 7 provides that a bill "must be read in each house on three separate days, unless this rule is waived by two-thirds vote."

A review of the legislative journal[1] shows compliance with both of the constitutional requirements.

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[1] "[W]hen enrolled, signed, and filed, acts of the legislature are prima facie valid." *State v. Kaufman*, 430 So.2d 904, 905 (Fla.1983). "Courts have no substantive power to review and nullify legislative proceedings but can determine whether the legislative journals show that a statute has been duly enacted." *Id.* (citations omitted).

The House of Representatives, on the opening day of the special session, introduced by two-thirds vote the legislative business of lobbying regulation by introducing HB 63-B, an "act relating to lobbying," dealing expressly with compensation reporting and expenditure limitations, and "any companion measures that may be passed by the Senate." Journal of the House, Special Session B, 2005 at 3. From that point forward, the House could have introduced and considered any bill relative to the legislative business of lobbying regulation, not just HB 63-B.

When the House went on to consider the bill that became the Act, SB 6-B, the House was not required to again introduce the legislative business of lobbying by two-thirds vote. They did so anyway. Journal of the House, Special Session B, 2005, at 48. After the vote to introduce SB 6-B, "the rules were waived and SB 6B was read a third time by title." *Id.* Article III, section 7, requires that a bill "be read in each house on three separate days, *unless this rule is waived by two-thirds vote.*" (emphasis supplied). Because the rule was waived it was not necessary to read the bill on three separate days.

Based on the foregoing, it appears that the House validly enacted SB 6-B. Plaintiffs have not demonstrated a substantial likelihood of success on this ground; nor have they shown that they are entitled to judgment as a matter of law.

B. No regulation of the practice of law

Plaintiffs contend that for lawyers who are lobbyists, lobbying takes the form of practicing law. Lawyer lobbyists provide legal analysis of legislation to their clients, draft legislation, determine the procedures to pass legislation, and appear before legislative committees and executive agencies to analyze the legislation. Plaintiffs argue that by imposing compensation disclosure requirements upon lawyer lobbyists, the Act regulates the practice of law, in violation of the exclusive constitutional authority of the Florida Supreme Court to regulate the practice of law.

The Florida Constitution, Article V, section 15, vests the Florida Supreme Court with "exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." The Florida Supreme Court has rejected the argument that its exclusive jurisdiction precludes the legislative branch from enacting laws "to punish conduct deemed harmful to the public welfare if the conduct also falls within the purview of [the] Court's authority to discipline lawyers for violating the Code of Professional Responsibility in the course of their practice of law." *Pace v. State,* 368 So.2d 340, 345 (Fla.1979). The Court recognized the legislature's authority to enact a law "'that affects the legal profession just as it can with regard to other occupations and professions.'" *Id.*

Although the Act, by imposing obligations on lawyer lobbyists, may have an impact on the practice of law, it does not appear that the legislature overstepped its authority as recognized in *Pace*. Plaintiffs have failed to demonstrate a substantial likelihood of success on the merits on this issue; nor have they shown that they are entitled to judgment as a matter of law.

C. Expenditure restriction[2]

Plaintiffs contend that the Act, by imposing an absolute ban on direct and indirect expenditures for lobbying, violates their rights to freedom of speech and association, and to petition the government for redress. Plaintiffs' arguments rest, however, on an unreasonable construction of the Act.

The Act provides that "no lobbyists or principal shall make, directly or indirectly, *and* no member or employee of the of the legislature" nor "any agency official, member or employee shall knowingly accept,

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[2] Plaintiffs argued in count four of their complaint that to the extent the expenditure restriction prohibits them from making campaign contributions to political candidates, the Act is unconstitutional. The Florida Legislature has recently passed SB 2000, which amends the definition of expenditure to exclude contributions. Therefore, Plaintiffs' argument as to this issue will likely become moot. Even if not moot, Plaintiffs do not need an injunction as to this provision to avoid irreparable injury. In making this determination, the Court has considered Plaintiffs' response (doc. 78), which the Court grants leave to file.

directly or indirectly, an expenditure." § 11.045(4)(a) and § 112.3215(6)(a), Fla. Stat. (emphasis supplied). The use of the conjunctive "and" in the Act makes clear the prohibition on expenditures applies only to expenditures that are made and accepted. The Act's plain language shows that it amounts to no more than a ban on gifts and payments to officials.

Plaintiffs explain that they "do not challenge the authority of the Legislature to impose a prohibition on lobbyists' buying food and beverage for legislators, executive branch members, or giving other gifts or things of value to such persons to influence their use of government authority." Although Plaintiffs contend that the expenditure prohibitions of the Act go far beyond what they agree would be appropriate, their position is not supported by the plain language of the Act. A statute written in the conjunctive must be construed as it is plainly written unless doing so yields absurd results or is contrary to legislative intent. *Florida Birth-Related Neurological Injury Compensation Ass'n v. Florida Div. Of Admin. Hearings,* 686 So.2d 1349, 1356 (Fla.1997).

Based on the foregoing, Plaintiffs have not demonstrated a substantial likelihood of success on their constitutional arguments regarding the expenditure restriction; nor have they demonstrated that they are entitled to judgment as a matter of law.

D. Disclosure requirements

Plaintiffs argue that the disclosure requirements are vague and standardless, thus unlawfully burdening their rights to free speech and association and to petition the government for redress. Plaintiffs further argue that the disclosure requirements violate their rights to equal protection and privacy.

1. the Act is not vague or standardless

A regulation is void on its face if persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). Plaintiffs cannot reasonably argue that they must guess at the meaning of the Act and their obligations to make disclosures.

Terms used in the Act are defined with reasonable clarity. Furthermore, Plaintiffs may obtain an advisory opinion to address specific questions about the applicability and interpretation of the Act. § 11.045(5) and § 112.3215(11), Fla. Stat. The availability of an advisory opinion weighs against a finding of vagueness. *See Comm'n on Indep. Colleges and Universities v. New York Temp. State Comm'n on Regulation of Lobbying,* 534 F.Supp. 489, 502-03 (N.D.N.Y.1982).

The Act, furthermore, provides sufficient standards to prevent arbitrary enforcement. Discretion under the act to waive a requirement or penalty is

tied to a good cause standard. See §§ 11.045(3)(e)5. and 6. and §§ 112.3215(5)(e)5., Fla. Stat. "'[G]ood cause' is a reasonable and intelligible standard that does not force people of general intelligence to guess at its meaning and therefore is not 'void for vagueness.'" *McCallum v. City of Biddeford,* 551 A.2d 452, 453 (Me.1988).

Plaintiffs also argue that the Act is overbroad because it requires lobbying firms to report all compensation, irrespective of whether the compensation is related to lobbying activities. A law will be struck down for overbreadth when "it does not aim specifically at evils within the allowable area of government control . . . but sweeps within its ambit other activities that constitute an exercise of freedom of speech. . . ." *Thornhill v. Alabama,* 310 U.S. 88, 97, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).

Plaintiffs' overbreadth argument is based on a flawed reading of the Act. The Act specifies that the compensation required to be reported is "for any lobbying activity." § 11.045(1)(b) and § 112.3214(1)(c), Fla. Stat. Lobbying firms need only report compensation earned for lobbying activity.[3] Moreover,

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[3] For legislative branch lobbying, the term "lobbying" is defined as "influencing or attempting to influence legislative action or nonaction through oral or written communication or an attempt to obtain the goodwill of a member or employee of the Legislature." § 11.045(1)(f), Fla. Stat. For executive branch lobbying, the term "'[l]obbies' means seeking on behalf of another person, to influence an agency with respect to a decision of the agency in the area of policy or procurement or an attempt

(Continued on following page)

"[a]pplication of the burdens of registration and disclosure of receipts and expenditures to lobbyists does not substantially interfere with the ability of the lobbyist to raise his voice." *Meggs,* 87 F.3d at 460 (quoting *Fair Political Practices Comm'n v. Superior Ct. of Los Angeles,* 25 Cal.3d 33, 157 Cal.Rptr. 855, 599 P.2d 46, 54 (1979)).

Plaintiffs have not demonstrated a substantial likelihood of success on these issues; nor have they shown that they are entitled to judgment as a matter of law.

2. equal protection

Plaintiffs argue that the Act imposes special unjustifiable burdens targeting lobbyists, in violation of the government's duty to avoid favoring some speakers over others. Plaintiffs apparently argue that lobbyists are similarly situated to private citizens, disregarding the fact that unlike private citizens, lobbyists are paid to present a point of view. Often the services of lobbyists are deemed valuable because of the influence lobbyists have developed with public officials to shape the exercise of duties that should be exercised in the public interest. Plaintiffs cannot

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to obtain the goodwill of an agency official or employee. 'Lobbbies' also means influencing or attempting to influence, on behalf of another, the Constitution Revision Commission's action or nonaction through oral or written communication or attempt to obtain the goodwill of a member or employee of the Constitution Revision Commission." § 112.3215(1)(f), Fla. Stat.

reasonably argue "that those who for hire attempt to influence legislation or who collect or spend funds for that purpose," *United States v. Harriss,* 347 U.S. 612, 625, 74 S.Ct. 808, 98 L.Ed. 989 (1954), are similarly situated with other citizens who petition the government.

The state has a compelling interest in imposing regulations on paid lobbyists which are not imposed on other citizens. *See Meggs,* 87 F.3d at 462 (recognizing compelling interest of state of Florida in lobbying regulation). Plaintiffs have not demonstrated a substantial likelihood of success on their equal protection issue; nor have they shown that they are entitled to judgment as a matter of law.

3. privacy

Plaintiffs contend that the disclosure of information relating to lobbyists' compensation under the Act violates the right to privacy under Article I, section 23 of the Florida Constitution and the right to privacy recognized in the United States Constitution. Plaintiffs' argument is unavailing because privacy rights protect natural persons.

The compensation disclosure requirement of the Act applies only to "lobbying firms." § 11.045(3) and § 112.3214(5), Fla. Stat. A lobbying firm is a "business entity." § 11.045(1)(g) and § 112.3214(1)(g), Fla. Stat. The individual plaintiffs in this case conduct their lobbying activity through lobbying firms. Plaintiff Book is an attorney and lobbyist whose firm is a

professional association. Plaintiff Spearman's lobbying firm is a corporation. Lobbying firms have no right to privacy under the Florida Constitution because the right to privacy "is a personal one, inuring solely to individuals." *Alterra Healthcare Corp. v. Estate of Francis Shelley,* 827 So.2d 936, 941 (Fla.2002). Under the United States Constitution, the right to privacy extends only to such fundamental interests as marriage, procreation, family relationships, and the rearing and education of children. *Carey v. Population Serv. Int'l,* 431 U.S. 678, 684-85, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977). "[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy." *California Bankers Ass'n v. Shultz,* 416 U.S. 21, 65, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974).

Plaintiffs have not demonstrated a substantial likelihood of success on their privacy issues; nor have they shown that they are entitled to judgment as a matter of law.

E. Enforcement provisions

Plaintiffs argue that the investigation and enforcement provisions of the Act violate the rights to a jury trial and due process. Plaintiffs also contend that the provisions of the Act relating to fact finding and adjudication violates separation of powers.

A jury trial is guaranteed "in those cases in which the right was enjoyed at the time this state's first constitution became effective in 1845." *Dep't of*

Revenue v. Printing House, 644 So.2d 498, 500 (Fla.1994). Courts have routinely held that no right to jury trial exists in civil administrative proceedings, including professional disciplinary proceedings akin to this case. *See State ex rel. Kehoe v. McRae,* 49 Fla. 389, 38 So. 605 (1905) (disbarment); *State ex rel. De Gaetani v. Driskell,* 139 Fla. 49, 190 So. 461 (1939) (revoking medical license).

In certain proceedings, such as those before boards or commissions, "it is sufficient if the accused is informed with reasonable certainty of the nature and cause of the accusation against him, has reasonable opportunity to defend against attempted proof of such charges, and the proceedings are conducted in a fair and impartial manner." *Hadley v. Dep't. of Admin.,* 411 So.2d 184, 187 (1982). Indeed, the Florida Constitution provides that "[c]ommissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the function of their offices." Art. V, § 1, Fla. Const.

Contrary to Plaintiffs' argument the Act does not necessarily allow the final decisionmaker to determine whether or not to impose a sanction at all, but rather constrains the final decisionmaker to choose between available sanctions if a violation is found. The Act, therefore, does not unlawfully delegate "the uniquely legislative power of determining the nature and extent of [civil penalties] which may be assessed." *Florida League of Cities, Inc. v. Administration Comm'n,* 586 So.2d 397, 410 (Fla.App. 1st Dist.1991).

Furthermore, to the extent the Act fails to provide for judicial review, a declaration concerning the constitutionality of the Act as applied or some other form of review may nevertheless be available. *See Nelson v. Lindsey,* 151 Fla. 596, 10 So.2d 131 (1942) (recognizing authority of the court to conduct appropriate judicial review, regardless of any specifically provided method of appeal).

F. Declaration of rights

As their final claim, Plaintiffs seek a declaration of their obligations under the law in the event the Court finds that the law is constitutional. Before Plaintiffs may properly seek a declaratory judgment, they should seek an advisory opinion regarding the Acts' applicability to differing factual scenarios, as provided by § 11.045(5) and § 112.3215(11), Fla. Stat. *Florida Marine Fisheries Comm'n v. Pringle,* 736 So.2d 17, 20 (Fla.App. 1st Dist.1999).

III. CONCLUSION

Plaintiffs have failed to meet their burden to obtain a preliminary injunction and summary judgment. Many of Plaintiffs' positions are contrary to the plain language of the Act. Plaintiffs, furthermore, have not sufficiently demonstrated that the Act is unconstitutional on its face. Accordingly, it is

ORDERED AND ADJUDGED that Plaintiffs' Motion for Preliminary Injunction and for Final Summary Judgment (doc. 15) is denied.

DONE AND ORDERED.

The First Amendment to the Constitution of the United States provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

11.045 Lobbying before the Legislature; registration and reporting; exemptions; penalties. –

(1) As used in this section, unless the context otherwise requires:

(a) "Committee" means the committee of each house charged by the presiding officer with responsibility for ethical conduct of lobbyists.

(b) "Compensation" means a payment, distribution, loan, advance, reimbursement, deposit, salary, fee, retainer, or anything of value provided or owed to a lobbying firm, directly or indirectly, by a principal for any lobbying activity.

(c) "Division" means the Division of Legislative Information Services within the Office of Legislative Services.

(d) "Expenditure" means a payment, distribution, loan, advance, reimbursement, deposit, or anything of value made by a lobbyist or principal for the purpose of lobbying. The term "expenditure" does not include contributions or expenditures reported pursuant to chapter 106 or federal election law, campaign-related personal services provided without compensation by individuals volunteering their time, any other contribution or expenditure made by or to a political party, or any other contribution or expenditure made by an organization that is exempt from taxation under 26 U.S.C. s. 527 or s. 501(c)(4).

(e) "Legislative action" means introduction, sponsorship, testimony, debate, voting, or any other

official action on any measure, resolution, amendment, nomination, appointment, or report of, or any matter which may be the subject of action by, either house of the Legislature or any committee thereof.

(f) "Lobbying" means influencing or attempting to influence legislative action or nonaction through oral or written communication or an attempt to obtain the goodwill of a member or employee of the Legislature.

(g) "Lobbying firm" means any business entity, including an individual contract lobbyist, that receives or becomes entitled to receive any compensation for the purpose of lobbying, where any partner, owner, officer, or employee of the business entity is a lobbyist.

(h) "Lobbyist" means a person who is employed and receives payment, or who contracts for economic consideration, for the purpose of lobbying, or a person who is principally employed for governmental affairs by another person or governmental entity to lobby on behalf of that other person or governmental entity.

(i) "Principal" means the person, firm, corporation, or other entity which has employed or retained a lobbyist.

(2) Each house of the Legislature shall provide by rule, or may provide by a joint rule adopted by both houses, for the registration of lobbyists who lobby the Legislature. The rule may provide for the payment of a registration fee. The rule may provide

for exemptions from registration or registration fees. The rule shall provide that:

(a) Registration is required for each principal represented.

(b) Registration shall include a statement signed by the principal or principal's representative that the registrant is authorized to represent the principal. The principal shall also identify and designate its main business on the statement authorizing that lobbyist pursuant to a classification system approved by the Office of Legislative Services.

(c) A registrant shall promptly send a written statement to the division canceling the registration for a principal upon termination of the lobbyist's representation of that principal. Notwithstanding this requirement, the division may remove the name of a registrant from the list of registered lobbyists if the principal notifies the office that a person is no longer authorized to represent that principal.

(d) Every registrant shall be required to state the extent of any direct business association or partnership with any current member of the Legislature.

(e) Each lobbying firm and each principal shall preserve for a period of 4 years all accounts, bills, receipts, computer records, books, papers, and other documents and records necessary to substantiate compensation. Any documents and records retained pursuant to this section may be subpoenaed for audit by legislative subpoena of either house of the

Legislature, and the subpoena may be enforced in circuit court.

(f) All registrations shall be open to the public.

(g) Any person who is exempt from registration under the rule shall not be considered a lobbyist for any purpose.

(3) Each house of the Legislature shall provide by rule the following reporting requirements:

(a)1. Each lobbying firm shall file a compensation report with the division for each calendar quarter during any portion of which one or more of the firm's lobbyists were registered to represent a principal. The report shall include the:

a. Full name, business address, and telephone number of the lobbying firm;

b. Name of each of the firm's lobbyists; and

c. Total compensation provided or owed to the lobbying firm from all principals for the reporting period, reported in one of the following categories: $0; $1 to $49,999; $50,000 to $99,999; $100,000 to $249,999; $250,000 to $499,999; $500,000 to $999,999; $1 million or more.

2. For each principal represented by one or more of the firm's lobbyists, the lobbying firm's compensation report shall also include the:

a. Full name, business address, and telephone number of the principal; and

b. Total compensation provided or owed to the lobbying firm for the reporting period, reported in one of the following categories: $0; $1 to $9,999; $10,000 to $19,999; $20,000 to $29,999; $30,000 to $39,999; $40,000 to $49,999; or $50,000 or more. If the category "$50,000 or more" is selected, the specific dollar amount of compensation must be reported, rounded up or down to the nearest $1,000.

3. If the lobbying firm subcontracts work from another lobbying firm and not from the original principal:

a. The lobbying firm providing the work to be subcontracted shall be treated as the reporting lobbying firm's principal for reporting purposes under this paragraph; and

b. The reporting lobbying firm shall, for each lobbying firm identified under subparagraph 2., identify the name and address of the principal originating the lobbying work.

4. The senior partner, officer, or owner of the lobbying firm shall certify to the veracity and completeness of the information submitted pursuant to this paragraph.

(b) For each principal represented by more than one lobbying firm, the division shall aggregate the reporting-period and calendar-year compensation reported as provided or owed by the principal.

(c) The reporting statements shall be filed no later than 45 days after the end of each reporting

period. The four reporting periods are from January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31, respectively. The statements shall be rendered in the identical form provided by the respective houses and shall be open to public inspection. Reporting statements must be filed by electronic means as provided in s. 11.0455.

(d) Each house of the Legislature shall provide by rule, or both houses may provide by joint rule, a procedure by which a lobbying firm that fails to timely file a report shall be notified and assessed fines. The rule shall provide for the following:

1. Upon determining that the report is late, the person designated to review the timeliness of reports shall immediately notify the lobbying firm as to the failure to timely file the report and that a fine is being assessed for each late day. The fine shall be $50 per day per report for each late day, not to exceed $5,000 per report.

2. Upon receipt of the report, the person designated to review the timeliness of reports shall determine the amount of the fine due based upon the earliest of the following:

a. When a report is actually received by the lobbyist registration and reporting office.

b. When the electronic receipt issued pursuant to s. 11.0455 is dated.

3. Such fine shall be paid within 30 days after the notice of payment due is transmitted by the Lobbyist Registration Office, unless appeal is made to the division. The moneys shall be deposited into the Legislative Lobbyist Registration Trust Fund.

4. A fine shall not be assessed against a lobbying firm the first time any reports for which the lobbying firm is responsible are not timely filed. However, to receive the one-time fine waiver, all reports for which the lobbying firm is responsible must be filed within 30 days after notice that any reports have not been timely filed is transmitted by the Lobbyist Registration Office. A fine shall be assessed for any subsequent late-filed reports.

5. Any lobbying firm may appeal or dispute a fine, based upon unusual circumstances surrounding the failure to file on the designated due date, and may request and shall be entitled to a hearing before the General Counsel of the Office of Legislative Services, who shall recommend to the President of the Senate and the Speaker of the House of Representatives, or their respective designees, that the fine be waived in whole or in part for good cause shown. The President of the Senate and the Speaker of the House of Representatives, or their respective designees, may concur in the recommendation and waive the fine in whole or in part. Any such request shall be made within 30 days after the notice of payment due is transmitted by the Lobbyist Registration Office. In such case, the lobbying firm shall, within the 30-day period, notify the person designated to review the

timeliness of reports in writing of his or her intention to request a hearing.

6. A lobbying firm may request that the filing of a report be waived upon good cause shown, based on unusual circumstances. The request must be filed with the General Counsel of the Office of Legislative Services, who shall make a recommendation concerning the waiver request to the President of the Senate and the Speaker of the House of Representatives. The President of the Senate and the Speaker of the House of Representatives may grant or deny the request.

7. All lobbyist registrations for lobbyists who are partners, owners, officers, or employees of a lobbying firm that fails to timely pay a fine are automatically suspended until the fine is paid or waived, and the division shall promptly notify all affected principals of any suspension or reinstatement.

8. The person designated to review the timeliness of reports shall notify the director of the division of the failure of a lobbying firm to file a report after notice or of the failure of a lobbying firm to pay the fine imposed.

(4)(a) Notwithstanding s. 112.3148, s. 112.3149, or any other provision of law to the contrary, no lobbyist or principal shall make, directly or indirectly, and no member or employee of the Legislature shall knowingly accept, directly or indirectly, any expenditure, except floral arrangements or other celebratory

items given to legislators and displayed in chambers the opening day of a regular session.

(b) No person shall provide compensation for lobbying to any individual or business entity that is not a lobbying firm.

(5) Each house of the Legislature shall provide by rule a procedure by which a person, when in doubt about the applicability and interpretation of this section in a particular context, may submit in writing the facts for an advisory opinion to the committee of either house and may appear in person before the committee. The rule shall provide a procedure by which:

(a) The committee shall render advisory opinions to any person who seeks advice as to whether the facts in a particular case would constitute a violation of this section.

(b) The committee shall make sufficient deletions to prevent disclosing the identity of persons in the decisions or opinions.

(c) All advisory opinions of the committee shall be numbered, dated, and open to public inspection.

(6) Each house of the Legislature shall provide by rule for keeping all advisory opinions of the committees relating to lobbying firms, lobbyists, and lobbying activities. The rule shall also provide that each house keep a current list of registered lobbyists along with reports required of lobbying firms under

this section, all of which shall be open for public inspection.

(7) Each house of the Legislature shall provide by rule that a committee of either house investigate any person upon receipt of a sworn complaint alleging a violation of this section, s. 112.3148, or s. 112.3149 by such person; also, the rule shall provide that a committee of either house investigate any lobbying firm upon receipt of audit information indicating a possible violation other than a late-filed report. Such proceedings shall be conducted pursuant to the rules of the respective houses. If the committee finds that there has been a violation of this section, s. 112.3148, or s. 112.3149, it shall report its findings to the President of the Senate or the Speaker of the House of Representatives, as appropriate, together with a recommended penalty, to include a fine of not more than $5,000, reprimand, censure, probation, or prohibition from lobbying for a period of time not to exceed 24 months. Upon the receipt of such report, the President of the Senate or the Speaker of the House of Representatives shall cause the committee report and recommendations to be brought before the respective house and a final determination shall be made by a majority of said house.

(8) Any person required to be registered or to provide information pursuant to this section or pursuant to rules established in conformity with this section who knowingly fails to disclose any material fact required by this section or by rules established in conformity with this section, or who knowingly

provides false information on any report required by this section or by rules established in conformity with this section, commits a noncriminal infraction, punishable by a fine not to exceed $5,000. Such penalty shall be in addition to any other penalty assessed by a house of the Legislature pursuant to subsection (7).

(9) There is hereby created the Legislative Lobbyist Registration Trust Fund, to be used for the purpose of funding any office established for the administration of the registration of lobbyists lobbying the Legislature, including the payment of salaries and other expenses, and for the purpose of paying the expenses incurred by the Legislature in providing services to lobbyists. The trust fund is not subject to the service charge to general revenue provisions of chapter 215. Fees collected pursuant to rules established in accordance with subsection (2) shall be deposited into the Legislative Lobbyist Registration Trust Fund.

* * *

11.0455 Electronic filing of compensation reports and other information. –

(1) As used in this section, the term "electronic filing system" means an Internet system for recording and reporting lobbying compensation and other required information by reporting period.

(2) Each lobbying firm that is required to file reports with the Division of Legislative Information Services pursuant to s. 11.045 must file such reports

with the division by means of the division's electronic filing system.

(3) A report filed pursuant to this section must be completed and filed through the electronic filing system not later than 11:59 p.m. of the day designated in s. 11.045. A report not filed by 11:59 p.m. of the day designated is a late-filed report and is subject to the penalties under s. 11.045(3).

(4) Each report filed pursuant to this section is considered to meet the certification requirements of s. 11.045(3)(a)4., and as such subjects the person responsible for filing and the lobbying firm to the provisions of s. 11.045(7) and (8). Persons given a secure sign-on to the electronic filing system are responsible for protecting it from disclosure and are responsible for all filings using such credentials, unless they have notified the division that their credentials have been compromised.

(5) The electronic filing system developed by the division must:

(a) Be based on access by means of the Internet.

(b) Be accessible by anyone with Internet access using standard web-browsing software.

(c) Provide for direct entry of compensation report information as well as upload of such information from software authorized by the division.

(d) Provide a method that prevents unauthorized access to electronic filing system functions.

(6) Each house of the Legislature shall provide by rule, or may provide by a joint rule adopted by both houses, procedures to implement and administer this section, including, but not limited to:

(a) Alternate filing procedures in case the division's electronic filing system is not operable.

(b) The issuance of an electronic receipt to the person submitting the report indicating and verifying the date and time that the report was filed.

(7) Each house of the Legislature shall provide by rule that the division make all the data filed available on the Internet in an easily understood and accessible format. The Internet website shall also include, but not be limited to, the names and business addresses of lobbyists, lobbying firms, and principals, the affiliations between lobbyists and principals, and the classification system designated and identified by each principal pursuant to s. 11.045(2).

* * *

11.40 Legislative Auditing Committee. –

(1) There is created a standing joint committee of the Legislature designated the Legislative Auditing Committee, composed of 10 members as follows: 5 members of the Senate, to be appointed by the President of the Senate, and 5 members of the House of Representatives, to be appointed by the Speaker of the House of Representatives. The terms of members shall be for 2 years and shall run from the organization of one Legislature to the organization of the next Legislature. Vacancies occurring during the interim period shall be filled in the same manner as the original appointment. The members of the committee shall elect a chair and vice chair. During the 2-year term, a member of each house shall serve as chair for 1 year.

(2) The committee shall be governed by joint rules of the Senate and House of Representatives which shall remain in effect until repealed or amended by concurrent resolution.

(3) The Legislative Auditing Committee may direct the Auditor General or the Office of Program Policy Analysis and Government Accountability to conduct an audit, review, or examination of any entity or record described in s. 11.45(2) or (3).

(4) The Legislative Auditing Committee may take under investigation any matter within the scope of an audit, review, or examination either completed or then being conducted by the Auditor General or the Office of Program Policy Analysis and Government

Accountability, and, in connection with such investigation, may exercise the powers of subpoena by law vested in a standing committee of the Legislature.

(5) Following notification by the Auditor General, the Department of Financial Services, or the Division of Bond Finance of the State Board of Administration of the failure of a local governmental entity, district school board, charter school, or charter technical career center to comply with the applicable provisions within s. 11.45(5)-(7), s. 218.32(1), or s. 218.38, the Legislative Auditing Committee may schedule a hearing. If a hearing is scheduled, the committee shall determine if the entity should be subject to further state action. If the committee determines that the entity should be subject to further state action, the committee shall:

(a) In the case of a local governmental entity or district school board, direct the Department of Revenue and the Department of Financial Services to withhold any funds not pledged for bond debt service satisfaction which are payable to such entity until the entity complies with the law. The committee shall specify the date such action shall begin, and the directive must be received by the Department of Revenue and the Department of Financial Services 30 days before the date of the distribution mandated by law. The Department of Revenue and the Department of Financial Services may implement the provisions of this paragraph.

(b) In the case of a special district, notify the Department of Community Affairs that the special district has failed to comply with the law. Upon receipt of notification, the Department of Community Affairs shall proceed pursuant to the provisions specified in s. 189.421.

(c) In the case of a charter school or charter technical career center, notify the appropriate sponsoring entity, which may terminate the charter pursuant to ss. 1002.33 and 1002.34.

(6)(a) As used in this subsection, "independent contract auditor" means a state-licensed certified public accountant or firm with which a state-licensed certified public accountant is currently employed or associated who is actively engaged in the accounting profession.

(b) Audits specified in this subsection cover the quarterly compensation reports for the previous calendar year for a random sample of 3 percent of all legislative branch lobbying firms and a random sample of 3 percent of all executive branch lobbying firms calculated using as the total number of such lobbying firms those filing a compensation report for the preceding calendar year. The committee shall provide for a system of random selection of the lobbying firms to be audited.

(c) The committee shall create and maintain a list of not less than 10 independent contract auditors approved to conduct the required audits. Each lobbying firm selected for audit in the random audit

process may designate one of the independent contract auditors from the committee's approved list. Upon failure for any reason of a lobbying firm selected in the random selection process to designate an independent contract auditor from the committee's list within 30 calendar days after being notified by the committee of its selection, the committee shall assign one of the available independent contract auditors from the approved list to perform the required audit. No independent contract auditor, whether designated by the lobbying firm or by the committee, may perform the audit of a lobbying firm where the auditor and lobbying firm have ever had a direct personal relationship or any professional accounting, auditing, tax advisory, or tax preparing relationship with each other. The committee shall obtain a written, sworn certification subject to s. 837.06, both from the randomly selected lobbying firm and from the proposed independent contract auditor, that no such relationship has ever existed.

(d) Each independent contract auditor shall be engaged by and compensated solely by the state for the work performed in accomplishing an audit under this subsection.

(e) Any violations of law, deficiencies, or material misstatements discovered and noted in an audit report shall be clearly identified in the audit report and be determined under the rules of either house of the Legislature or under the joint rules, as applicable.

(f) If any lobbying firm fails to give full, frank, and prompt cooperation and access to books, records, and associated backup documents as requested in writing by the auditor, that failure shall be clearly noted by the independent contract auditor in the report of audit.

(g) The committee shall establish procedures for the selection of independent contract auditors desiring to enter into audit contracts pursuant to this subsection. Such procedures shall include, but not be limited to, a rating system that takes into account pertinent information, including the independent contract auditor's fee proposals for participating in the process. All contracts under this subsection between an independent contract auditor and the Speaker of the House of Representatives and the President of the Senate shall be terminable by either party at any time upon written notice to the other, and such contracts may contain such other terms and conditions as the Speaker of the House of Representatives and the President of the Senate deem appropriate under the circumstances.

(h) The committee shall adopt guidelines that govern random audits and field investigations conducted pursuant to this subsection. The guidelines shall ensure that similarly situated compensation reports are audited in a uniform manner. The guidelines shall also be formulated to encourage compliance and detect violations of the legislative and executive lobbying compensation reporting requirements in ss. 11.045 and 112.3215 and to ensure that

each audit is conducted with maximum efficiency in a cost-effective manner. In adopting the guidelines, the committee shall consider relevant guidelines and standards of the American Institute of Certified Public Accountants to the extent that such guidelines and standards are applicable and consistent with the purposes set forth in this subsection.

(i) All audit reports of legislative lobbying firms shall, upon completion by an independent contract auditor, be delivered to the President of the Senate and the Speaker of the House of Representatives for their respective review and handling. All audit reports of executive branch lobbyists, upon completion by an independent contract auditor, shall be delivered by the auditor to the Commission on Ethics.

* * *

112.3215 Lobbying before the executive branch or the Constitution Revision Commission; registration and reporting; investigation by commission. –

(1) For the purposes of this section:

(a) "Agency" means the Governor, Governor and Cabinet, or any department, division, bureau, board, commission, or authority of the executive branch. In addition, "agency" shall mean the Constitution Revision Commission as provided by s. 2, Art. XI of the State Constitution.

(b) "Agency official" or "employee" means any individual who is required by law to file full or limited public disclosure of his or her financial interests.

(c) "Compensation" means a payment, distribution, loan, advance, reimbursement, deposit, salary, fee, retainer, or anything of value provided or owed to a lobbying firm, directly or indirectly, by a principal for any lobbying activity.

(d) "Expenditure" means a payment, distribution, loan, advance, reimbursement, deposit, or anything of value made by a lobbyist or principal for the purpose of lobbying. The term "expenditure" does not include contributions or expenditures reported pursuant to chapter 106 or federal election law, campaign-related personal services provided without compensation by individuals volunteering their time, any other contribution or expenditure made by or to a

political party, or any other contribution or expenditure made by an organization that is exempt from taxation under 26 U.S.C. s. 527 or s. 501(c)(4).

(e) "Fund" means the Executive Branch Lobby Registration Trust Fund.

(f) "Lobbies" means seeking, on behalf of another person, to influence an agency with respect to a decision of the agency in the area of policy or procurement or an attempt to obtain the goodwill of an agency official or employee. "Lobbies" also means influencing or attempting to influence, on behalf of another, the Constitution Revision Commission's action or nonaction through oral or written communication or an attempt to obtain the goodwill of a member or employee of the Constitution Revision Commission.

(g) "Lobbying firm" means a business entity, including an individual contract lobbyist, that receives or becomes entitled to receive any compensation for the purpose of lobbying, where any partner, owner, officer, or employee of the business entity is a lobbyist.

(h) "Lobbyist" means a person who is employed and receives payment, or who contracts for economic consideration, for the purpose of lobbying, or a person who is principally employed for governmental affairs by another person or governmental entity to lobby on behalf of that other person or governmental entity. "Lobbyist" does not include a person who is:

1. An attorney, or any person, who represents a client in a judicial proceeding or in a formal administrative proceeding conducted pursuant to chapter 120 or any other formal hearing before an agency, board, commission, or authority of this state.

2. An employee of an agency or of a legislative or judicial branch entity acting in the normal course of his or her duties.

3. A confidential informant who is providing, or wishes to provide, confidential information to be used for law enforcement purposes.

4. A person who lobbies to procure a contract pursuant to chapter 287 which contract is less than the threshold for CATEGORY ONE as provided in s. 287.017(1)(a).

(i) "Principal" means the person, firm, corporation, or other entity which has employed or retained a lobbyist.

(2) The Executive Branch Lobby Registration Trust Fund is hereby created within the commission to be used for the purpose of funding any office established to administer the registration of lobbyists lobbying an agency, including the payment of salaries and other expenses. The trust fund is not subject to the service charge to General Revenue provisions of chapter 215. All annual registration fees collected pursuant to this section shall be deposited into such fund.

(3) A person may not lobby an agency until such person has registered as a lobbyist with the commission. Such registration shall be due upon initially being retained to lobby and is renewable on a calendar year basis thereafter. Upon registration the person shall provide a statement signed by the principal or principal's representative that the registrant is authorized to represent the principal. The principal shall also identify and designate its main business on the statement authorizing that lobbyist pursuant to a classification system approved by the commission. The registration shall require each lobbyist to disclose, under oath, the following information:

(a) Name and business address;

(b) The name and business address of each principal represented;

(c) His or her area of interest;

(d) The agencies before which he or she will appear; and

(e) The existence of any direct or indirect business association, partnership, or financial relationship with any employee of an agency with which he or she lobbies, or intends to lobby, as disclosed in the registration.

(4) The annual lobbyist registration fee shall be set by the commission by rule, not to exceed $40 for each principal represented.

(5)(a) 1. Each lobbying firm shall file a compensation report with the commission for each calendar quarter during any portion of which one or more of the firm's lobbyists were registered to represent a principal. The report shall include the:

a. Full name, business address, and telephone number of the lobbying firm;

b. Name of each of the firm's lobbyists; and

c. Total compensation provided or owed to the lobbying firm from all principals for the reporting period, reported in one of the following categories: $0; $1 to $49,999; $50,000 to $99,999; $100,000 to $249,999; $250,000 to $499,999; $500,000 to $999,999; $1 million or more.

2. For each principal represented by one or more of the firm's lobbyists, the lobbying firm's compensation report shall also include the:

a. Full name, business address, and telephone number of the principal; and

b. Total compensation provided or owed to the lobbying firm for the reporting period, reported in one of the following categories: $0; $1 to $9,999; $10,000 to $19,999; $20,000 to $29,999; $30,000 to $39,999; $40,000 to $49,999; or $50,000 or more. If the category "$50,000 or more" is selected, the specific dollar amount of compensation must be reported, rounded up or down to the nearest $1,000.

3. If the lobbying firm subcontracts work from another lobbying firm and not from the original principal:

a. The lobbying firm providing the work to be subcontracted shall be treated as the reporting lobbying firm's principal for reporting purposes under this paragraph; and

b. The reporting lobbying firm shall, for each lobbying firm identified under subparagraph 2., identify the name and address of the principal originating the lobbying work.

4. The senior partner, officer, or owner of the lobbying firm shall certify to the veracity and completeness of the information submitted pursuant to this paragraph.

(b) For each principal represented by more than one lobbying firm, the commission shall aggregate the reporting-period and calendar-year compensation reported as provided or owed by the principal.

(c) The reporting statements shall be filed no later than 45 days after the end of each reporting period. The four reporting periods are from January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31, respectively. Reporting statements must be filed by electronic means as provided in s. 112.32155.

(d) The commission shall provide by rule the grounds for waiving a fine, the procedures by which a

lobbying firm that fails to timely file a report shall be notified and assessed fines, and the procedure for appealing the fines. The rule shall provide for the following:

1. Upon determining that the report is late, the person designated to review the timeliness of reports shall immediately notify the lobbying firm as to the failure to timely file the report and that a fine is being assessed for each late day. The fine shall be $50 per day per report for each late day up to a maximum of $5,000 per late report.

2. Upon receipt of the report, the person designated to review the timeliness of reports shall determine the amount of the fine due based upon the earliest of the following:

a. When a report is actually received by the lobbyist registration and reporting office.

b. When the electronic receipt issued pursuant to s. 112.32155 is dated.

3. Such fine shall be paid within 30 days after the notice of payment due is transmitted by the Lobbyist Registration Office, unless appeal is made to the commission. The moneys shall be deposited into the Executive Branch Lobby Registration Trust Fund.

4. A fine shall not be assessed against a lobbying firm the first time any reports for which the lobbying firm is responsible are not timely filed. However, to receive the one-time fine waiver, all reports for which the lobbying firm is responsible

must be filed within 30 days after the notice that any reports have not been timely filed is transmitted by the Lobbyist Registration Office. A fine shall be assessed for any subsequent late-filed reports.

5. Any lobbying firm may appeal or dispute a fine, based upon unusual circumstances surrounding the failure to file on the designated due date, and may request and shall be entitled to a hearing before the commission, which shall have the authority to waive the fine in whole or in part for good cause shown. Any such request shall be made within 30 days after the notice of payment due is transmitted by the Lobbyist Registration Office. In such case, the lobbying firm shall, within the 30-day period, notify the person designated to review the timeliness of reports in writing of his or her intention to bring the matter before the commission.

6. The person designated to review the timeliness of reports shall notify the commission of the failure of a lobbying firm to file a report after notice or of the failure of a lobbying firm to pay the fine imposed. All lobbyist registrations for lobbyists who are partners, owners, officers, or employees of a lobbying firm that fails to timely pay a fine are automatically suspended until the fine is paid or waived, and the commission shall promptly notify all affected principals of each suspension and each reinstatement.

7. Notwithstanding any provision of chapter 120, any fine imposed under this subsection that is

not waived by final order of the commission and that remains unpaid more than 60 days after the notice of payment due or more than 60 days after the commission renders a final order on the lobbying firm's appeal shall be collected by the Department of Financial Services as a claim, debt, or other obligation owed to the state, and the department may assign the collection of such fine to a collection agent as provided in s. 17.20.

(e) Each lobbying firm and each principal shall preserve for a period of 4 years all accounts, bills, receipts, computer records, books, papers, and other documents and records necessary to substantiate compensation. Any documents and records retained pursuant to this section may be subpoenaed for audit by the Legislative Auditing Committee pursuant to s. 11.40, and such subpoena may be enforced in circuit court.

(6)(a) Notwithstanding s. 112.3148, s. 112.3149, or any other provision of law to the contrary, no lobbyist or principal shall make, directly or indirectly, and no agency official, member, or employee shall knowingly accept, directly or indirectly, any expenditure.

(b) No person shall provide compensation for lobbying to any individual or business entity that is not a lobbying firm.

(7) A lobbyist shall promptly send a written statement to the commission canceling the registration for a principal upon termination of the lobbyist's

representation of that principal. Notwithstanding this requirement, the commission may remove the name of a lobbyist from the list of registered lobbyists if the principal notifies the office that a person is no longer authorized to represent that principal.

(8)(a) The commission shall investigate every sworn complaint that is filed with it alleging that a person covered by this section has failed to register, has failed to submit a compensation report, or has knowingly submitted false information in any report or registration required in this section.

(b) All proceedings, the complaint, and other records relating to the investigation are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution, and any meetings held pursuant to an investigation are exempt from the provisions of s. 286.011(1) and s. 24(b), Art. I of the State Constitution either until the alleged violator requests in writing that such investigation and associated records and meetings be made public or until the commission determines, based on the investigation, whether probable cause exists to believe that a violation has occurred.

(c) The commission shall investigate any lobbying firm, agency, officer, or employee upon receipt of information from a sworn complaint or from a random audit of lobbying reports indicating a possible violation other than a late-filed report.

(d) Records relating to an audit conducted pursuant to this section or an investigation conducted

pursuant to this section or s. 112.32155 are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, and any meetings held pursuant to such an investigation or at which such an audit is discussed are exempt from s. 286.011 and s. 24(b), Art. I of the State Constitution either until the lobbying firm requests in writing that such investigation and associated records and meetings be made public or until the commission determines there is probable cause that the audit reflects a violation of the reporting laws. This paragraph is subject to the Open Government Sunset Review Act in accordance with s. 119.15 and shall stand repealed on October 2, 2011, unless reviewed and saved from repeal through reenactment by the Legislature.

(9) If the commission finds no probable cause to believe that a violation of this section occurred, it shall dismiss the complaint, whereupon the complaint, together with a written statement of the findings of the investigation and a summary of the facts, shall become a matter of public record, and the commission shall send a copy of the complaint, findings, and summary to the complainant and the alleged violator. If, after investigating information from a random audit of lobbying reports, the commission finds no probable cause to believe that a violation of this section occurred, a written statement of the findings of the investigation and a summary of the facts shall become a matter of public record, and the commission shall send a copy of the findings and summary to the alleged violator. If the commission

finds probable cause to believe that a violation occurred, it shall report the results of its investigation to the Governor and Cabinet and send a copy of the report to the alleged violator by certified mail. Such notification and all documents made or received in the disposition of the complaint shall then become public records. Upon request submitted to the Governor and Cabinet in writing, any person whom the commission finds probable cause to believe has violated any provision of this section shall be entitled to a public hearing. Such person shall be deemed to have waived the right to a public hearing if the request is not received within 14 days following the mailing of the probable cause notification. However, the Governor and Cabinet may on its own motion require a public hearing and may conduct such further investigation as it deems necessary.

(10) If the Governor and Cabinet finds that a violation occurred, it may reprimand the violator, censure the violator, or prohibit the violator from lobbying all agencies for a period not to exceed 2 years. If the violator is a lobbying firm, the Governor and Cabinet may also assess a fine of not more than $5,000 to be deposited in the Executive Branch Lobby Registration Trust Fund.

(11) Any person, when in doubt about the applicability and interpretation of this section to himself or herself in a particular context, may submit in writing the facts of the situation to the commission with a request for an advisory opinion to establish the standard of duty. An advisory opinion shall be

rendered by the commission and, until amended or revoked, shall be binding on the conduct of the person who sought the opinion, unless material facts were omitted or misstated in the request.

(12) Agencies shall be diligent to ascertain whether persons required to register pursuant to this section have complied. An agency may not knowingly permit a person who is not registered pursuant to this section to lobby the agency.

(13) Upon discovery of violations of this section an agency or any person may file a sworn complaint with the commission.

(14) The commission shall adopt rules to administer this section, which shall prescribe forms for registration and compensation reports, procedures for registration, and procedures that will prevent disclosure of information that is confidential as provided in this section.

* * *

112.32155 Electronic filing of compensation reports and other information. –

(1) As used in this section, the term "electronic filing system" means an Internet system for recording and reporting lobbying compensation and other required information by reporting period.

(2) Each lobbying firm who is required to file reports with the Commission on Ethics pursuant to s. 112.3215 must file such reports with the commission by means of the electronic filing system.

(3) A report filed pursuant to this section must be completed and filed through the electronic filing system not later than 11:59 p.m. of the day designated in s. 112.3215. A report not filed by 11:59 p.m. of the day designated is a late-filed report and is subject to the penalties under s. 112.3215(5).

(4) Each report filed pursuant to this section is considered to meet the certification requirements of s. 112.3215(5)(a)4. Persons given a secure sign-on to the electronic filing system are responsible for protecting it from disclosure and are responsible for all filings using such credentials, unless they have notified the commission that their credentials have been compromised.

(5) The electronic filing system must:

(a) Be based on access by means of the Internet.

(b) Be accessible by anyone with Internet access using standard web-browsing software.

(c) Provide for direct entry of compensation report information as well as upload of such information from software authorized by the commission.

(d) Provide a method that prevents unauthorized access to electronic filing system functions.

(6) The commission shall provide by rule procedures to implement and administer this section, including, but not limited to:

(a) Alternate filing procedures in case the electronic filing system is not operable.

(b) The issuance of an electronic receipt to the person submitting the report indicating and verifying the date and time that the report was filed.

(7) The commission shall make all the data filed available on the Internet in an easily understood and accessible format. The Internet website shall also include, but not be limited to, the names and business addresses of lobbyists, lobbying firms, and principals, the affiliations between lobbyists and principals, and the classification system designated and identified by each principal pursuant to s. 112.3215(3).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FLORIDA ASSOCIATION OF PROFESSIONAL LOBBYISTS INC, et al.

VS

DIVISION OF LEGISLATIVE INFORMATION SERVICES OF THE FLORIDA OFFICE OF LEGISLATIVE SERVICES, et al.

CASE NO. 4:06-cv-00123-SPM-WCS

JUDGMENT

This action came to trial or hearing before the Court with the Honorable Stephen P. Mickle presiding. The issues have been tried or heard and a decision has been rendered.

Judgment is entered in favor of Defendants, DIVISION OF LEGISLATIVE INFORMATION SERVICES OF THE FLORIDA OFFICE OF LEGISLATIVE SERVICES, THE FLORIDA COMMISSION ON ETHICS, TOM LEE, ALLAN BENSE, and against the Plaintiffs, FLORIDA ASSOCIATION OF PROFESSIONAL LOBBYISTS INC, SPEARMAN MANAGEMENT COMPANY, GUY M SPEARMAN, III, RONALD L BOOK PA, RONALD L BOOK, on all

claims. This case is closed. Costs are allowed as provided by law.

WILLIAM M. McCOOL,
CLERK OF COURT

December 28, 2006 — s/ Louise Trautman
DATE — Deputy Clerk: Louise Trautman

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(2)

Supreme Court, U.S.
FILED
AUG 28 2009
OFFICE OF THE CLERK

No. 09-154

In the Supreme Court of the United States

FLORIDA ASSOCIATION OF PROFESSIONAL LOBBYISTS, INC., a Florida Not for Profit Corporation; GUY M. SPEARMAN, III, a Natural Person; SPEARMAN MANAGEMENT COMPANY, a Florida Corporation; RONALD L. BOOK, a Natural Person; RONALD L. BOOK, P.A., a Florida Professional Association,

Petitioners,

v.

DIVISION OF LEGISLATIVE INFORMATION SERVICES OF THE FLORIDA OFFICE OF LEGISLATIVE SERVICES, a Florida State Agency; THE FLORIDA COMMISSION ON ETHICS, an Independent Constitutional Commission; JEFF ATWATER, as President of the Florida Senate; and LARRY CRETFUL, as Speaker of the Florida House of Representatives,

Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals for the Eleventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a state law that requires disclosure of the identities of those paying for grassroots lobbying – "opinion articles, issue advertisements, and letter writing campaigns" – facially violates the First and Fourteenth Amendments due to vagueness and overbreadth.

2. Whether a state law that prohibits all gifts for the purpose of lobbying facially violates the First and Fourteenth Amendments due to vagueness and overbreadth.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption. The respondents are all government entities or office holders.

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Florida Association of Professional Lobbyists, Inc. v. Division of Legislative Information Services, 525 F. 3d 1073 (11th Cir. Apr. 23, 2008) (affirmed in part and question certified). (Pet. App. 3)

Florida Association of Professional Lobbyists, Inc. v. Division of Legislative Information Services, No. SC08-791, 7 So. 3d 511 (Fla. 2008) (certified questions answered). (Pet. App. 19)

Florida Association of Professional Lobbyists, Inc. v. Division of Legislative Information Services, No. 4:06cv123-SPM/WCS 2006 WL 3826985 (N.D. Fla. Dec. 28, 2006) (final summary judgment). (Pet. App. 33)

Florida Association of Professional Lobbyists, Inc. v. Division of Legislative Information Services, 431 F. Supp. 2d 1228 (N.D. Fla. 2006) (preliminary injunction denial). (Pet. App. 46)

JURISDICTION

This court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions at issue are reproduced in the appendix to the petition for writ of certiorari.

STATEMENT OF THE CASE

In 2005 the Florida Legislature enacted chapter 2005-359, Laws of Florida (the "Act"), to further regulate the practice of paid lobbying before the legislative and executive branches of state government. Petitioners, without waiting to see how the Act might be applied to the various activities they claim they are involved in, *see* Petition at 6-7, immediately filed suit asserting the Act was *facially* invalid under the state and federal constitutions. Here, they attack certain provisions of the Act codified at sections 11.045 and 112.3215, Florida Statutes, which the Eleventh Circuit found neither unconstitutionally vague nor overbroad under the First and Fourteenth Amendments.[1]

Each statute generally bans payments to legislators, executive branch officials and their staffs, requires lobbying firms to prepare and file quarterly compensation reports disclosing compensation they receive from clients or principals, and provides for sanctions against lobbying firms that fail to follow the Act.

With respect to the legislative branch the Act specifically provides that:

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[1] *Florida Ass'n of Prof. Lobbyists, Inc. v. Div. of Legislative Info. Servs.*, 525 F.3d 1073 (11th Cir. 2008). The Eleventh Circuit certified three state-law questions to the Florida Supreme Court, which ruled that the Act did not violate the Florida Constitution. *Florida Ass'n of Prof. Lobbyists, Inc. v. Div. of Legislative Info. Servs.*, 7 So. 3d 511 (Fla. 2009). The Eleventh Circuit then affirmed the district court's judgment. *Florida Ass'n of Prof. Lobbyists, Inc. v. Div. of Legislative Info. Servs.*, 566 F.3d 1281 (11th Cir. 2009).

> [N]o lobbyist or principal shall make, directly or indirectly, and no member or employee of the Legislature shall knowingly accept, directly or indirectly, any expenditure, except floral arrangements or other celebratory items given to legislators and displayed in chambers the opening day of a regular session.

Fla. Stat. § 11.045(4)(a). An "expenditure" is a "payment" or "anything of value" "made by a lobbyist or principal for the purpose of lobbying. Fla. Stat. § 11.045(1)(d). "Lobbying" is defined as "influencing or attempting to influence legislative action or nonaction through oral or written communication or an attempt to obtain the goodwill of a member or employee of the Legislature." Fla. Stat. § 11.045(1)(f). "Lobbyists" and "lobbying firms" are those persons or business entities who are paid to lobby. Fla. Stat. § 11.045(1)(g) & (h). The definitions and prohibitions are essentially the same for the executive branch. *See* Fla. Stat. § 112.3215(1)(d), (f) & (6)(a).

The Act further requires that lobbying firms file quarterly reports designating the total compensation paid or owed to the firm resulting from "lobbying activity" in broad, monetarily-defined categories. *See* Fla. Stat. §§ 11.045(3)(a)1.c. & 112.3215(5)(a)1.c. ("$0; $1 to $49,999; $50,000 to $99,999; $100,000 to $249,999; $250,000 to $499,999; $500,000 to $999,999; $1 million or more.").

Lobbying firms must also report total compensation provided or owed by each "principal" or the "person, firm, corporation or other entity which has employed or retained a lobbyist," in similar broad

categories. Fla. Stat. §§ 11.045(1)(i), 112.3215(1)(i), 11.045(3)(a)2.b. and 112.3215(5)(a)2.b. ("$0; $1 to $9,999; $10,000 to $19,999; $20,000 to $29,999; $30,000 to $39,999; $40,000 to $49,999; or $50,000 or more."). For any principal providing or owing $50,000 or more, the firm must report the dollar amount of compensation received from the principal "rounded up or down to the nearest $1,000." *Id.*

Petitioners contended that the prohibition on the making or acceptance of an expenditure "directly or indirectly" was so unclear that a person of common intelligence could only guess at its meaning. The Eleventh Circuit rejected this vagueness challenge out of hand, pointing out that the Act "only bars those lobbying expenditures accepted by a governmental official." *Florida Ass'n of Prof. Lobbyists, Inc. v. Div. of Legislative Info. Servs.*, 525 F.3d 1073, 1078-79 (11th Cir. 2009). The term "indirect" was not vague. "[A] person of common intelligence would understand that it applies to expenditures or compensation paid through a third party." *Id.*

The Eleventh Circuit interpreted petitioners' overbreadth argument as a challenge to "disclosure of compensation paid to a lobbyist even where that compensation has not been paid for expressly advocating passage or defeat of legislation." *Id.* But the court rejected this claim as misconstruing the Act. *Id.* "Contrary to their claim that the Act requires the disclosure of all compensation paid to lobbyists regardless of how the funds are used, the Act actually only requires the reporting of compensation that lobbyists 'receive for any lobbying activity.' Fla. Stat. §§ 11.045(1)(b), 112.3215(1)(c)."

The Eleventh Circuit then took note of petitioners' contention that the definition of lobbying encompassed not only direct communication "but also indirect communications—such as opinion articles, issue advertisements, and letter writing campaigns—from lobbyists on behalf of their clients *to the press and public at large for the purpose of influencing legislation or policy*." *Id.* at 1080 (emphasis added).[2]

The court rejected this argument as a basis for invalidation of the Act. Holding that a state has a compelling interest in "self-protection in the face of coordinated pressure campaigns by lobbyists," and that these interests are compelling whether they are "direct" or "indirect," it could not find that the Act "on its face [was] substantially overbroad." *Id.* Accordingly, it left "whatever overbreadth may exist [to] be cured through case-by-case analysis of the fact situations to which [the Act's] sanctions, assertedly, may not be applied." *Id.* (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615-616 (1973)).

The Act provides a mechanism by which any persons "in doubt about the applicability and interpretation of [the Act] in a particular context" may obtain an advisory opinion. Fla. Stat. §§ 11.045(5) and 112.3215(11). The district court noted that these provisions "weigh[ed] against any finding of vagueness" and that petitioners were free to "seek an advisory opinion regarding the Act's applicability to differing factual scenarios." *Florida Ass'n of Prof. Lobbyists, Inc. v. Div. of Legislative Info.*

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[2] The first of the questions presented does not accurately quote this statement. The omission of half the statement results in a question not presented or passed upon in the proceedings below.

Servs., 431 F. Supp. 2d 1228, 1235 & 1237 (N.D. Fla. 2006).

REASONS FOR DENYING THE WRIT

Petitioners argue that this Court's forthcoming decision in *Citizens United v. FEC*, No. 08-205, to the extent it may overrule *McConnell v. Federal Elections Commission*, 540 U.S. 93 (2003), could undermine the Act's disclosure requirements as applied to "indirect" lobbying and the Act's ban on gifts. They also contend the Eleventh Circuit's decision conflicts with decisions of this Court, federal courts of appeals, and state supreme courts. The petition does not support such claims and should therefore be denied.

Further, neither of the questions presented was addressed in the Eleventh Circuit. The first question does not fully quote the Eleventh Circuit's language, and is thereby misleading. Petitioners argued only the vagueness of the Act as it applied to gifts, not its overbreadth and not the right of the state to prohibit gifts. The arguments now presented in the Petition were not pressed or passed upon below, and therefore do not warrant a grant of certiorari.

I. Certiorari is Not Warranted Because the Decision in *Citizens United v. FEC* Will Not Affect This Case.

A. Petitioners misread *United States v. Harriss*, the decision of the Eleventh Circuit, and the Act.

Petitioners assert that the decision in *United States v. Harriss*, 347 U.S. 612 (1954), did not address disclosure requirements as applied to "indirect"

lobbying and therefore lower courts considering "grass roots lobbying" have relied on *McConnell*. Pet. at 15-16. The *McConnell* decision upheld the facial validity of section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b, distinguishing between express advocacy and issue advocacy in federal election campaigns. *McConnell* is relevant, petitioners contend, because the *Harriss* Court construed the federal act regulating lobbying "as applicable *solely* to direct, face-to-face lobbying of Congress and to direct letter writing to Congress." Pet. at 14 (emphasis added). Petitioners have misread *Harriss*.

Harriss involved a criminal prosecution and the issue was whether the federal lobbying act could withstand a vagueness challenge. The question this Court addressed was who were the persons to whom the act could constitutionally apply. Unlike the Florida law, § 307 of the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270, was not by its terms limited to professional lobbyists—that is, only those persons hired and paid to influence legislation. Section 307 and the reporting requirements of § 305 applied to "any person" who might collect or receive money that would even "indirectly" aid in or influence the passage of legislation. As written, the criminal sanctions of the federal act applied equally to those who were not hired lobbyists but who merely sought to exercise their First Amendment rights to engage in or stimulate public debate. Hence, the *Harriss* decision limited the application of the federal act to persons engaged in "lobbying in its commonly accepted sense"—that is, "to direct communication with members of Congress on pending or proposed federal legislation." 347 U.S. at 620.

The Court in *Harriss* went on to say:

> The legislative history of the Act makes clear that, *at the very least, Congress sought disclosure of such direct pressures, exerted by the lobbyists themselves or through their hirelings or through an artificially stimulated letter campaign.* It is likewise clear that Congress would have intended the Act to operate on this narrower basis, even if a broader application to organizations seeking to propagandize the general public were not permissible.

Id. at 620-621 (emphasis added) (footnotes omitted). It is obvious that *Harriss* intended only to foreclose application of the federal act to individuals or organizations who sought only to influence public opinion. *Harriss* did not hold, or even suggest, that a reporting requirement applicable to lobbyists who, on behalf of their principals, take action intended to influence Congress through orchestrated letter campaigns or other circuitous means would violate the First Amendment. To the contrary, *Harriss* expressly recognized Congress' power to inform itself about such calculated activities.

Petitioners also misread the decision below in claiming that the Eleventh Circuit agreed that the Florida Act encompassed not only direct communication "but also indirect communications—such as opinion articles, issue advertisements, and letter writing campaigns—from lobbyists on behalf of their clients to the press and public at large for the purpose of influencing legislation or policy." Pet. at 11-12. The Eleventh Circuit only acknowledged this

to be petitioners' argument. 525 F.3d at 1080. (As noted, the first question presented does not accurately reflect the quoted language.) While recognizing the authority of the legislature to evaluate indirect pressures, the Eleventh Circuit plainly stated that any overbreadth would have to be addressed on a case-by-case basis. *Id.*

Petitioners' facial challenge was not based on any evidence showing how the Act had been applied to any of their "indirect" lobbying activities. Moreover, the definition of "lobbying" in the Act does not embrace pure issue advocacy, assuming that is even conducted by lobbyists. Petitioners' overbreadth claim lacks any context whatsoever, and therefore the decision of the Eleventh Circuit is indisputably correct. As that court pointed out, petitioners' burden under the First Amendment is to show that the Florida Act punishes a substantial amount of protected free speech. *Id.* at 1079. Its application to protected speech must be substantial, "not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Virginia v. Hicks*, 539 U.S. 113, 120 (2003). Petitioners did not make that showing. [3]

The petition fails to show how overruling either *McConnell* or *Austin*[4] would compel any modification to, much less reversal of, the decision below insofar as

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[3] Respondents note that petitioners describe in general terms a number of activities they undertake as lobbyists. Pet. at 7. If petitioners have any doubts about whether the Act applies to these or other activities, they may seek an advisory opinion as provided for by law. *See* Fla. Stat. §§ 11.045(5) & 112.3215(11).

[4] *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

it could be said to address "indirect" lobbying. Even if this Court should find in *Citizens United* that a distinction between express and issue advocacy has proved unworkable in campaign regulation, it will have done so on the basis of substantial experience. However, the claim here, being wholly without context, hardly rises to the level of speculation. Petitioners feign confusion over the Act's application to "indirect lobbying" without ever having presented to the lower courts a single concrete example, much less a substantial number, of lobbying activities to which the Act has been unconstitutionally applied. And they have never contended that the First Amendment shields lobbyists from disclosing the identity of those who fund efforts to influence legislative action.

Further, *McConnell* notes that the distinction between express advocacy and "so-called issue advocacy" is not constitutionally compelled. 540 U.S. at 204-205. The express advocacy test announced in *Buckley v. Valeo*, 414 U.S. 1, 78-81 (1976), was the result of the need to narrowly construe the phrase "for the purpose of . . . influencing" a federal election. *Id.* at 191-192. What that terminology might mean was entirely open-ended. Hence, the Court construed it to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 191.

In contrast, Florida defines "lobbying" to mean "influencing or attempting to influence legislative action or nonaction through oral or written communication . . . ." That is neither vague nor overbroad. It means action taken by a lobbyist that is calculated to induce the legislature to act in a particular way. Unless this Court effectively holds in

Citizens United that the legislature and the public have no right to know who pays lobbyists to influence legislation, its decision will have no bearing on the issues in this case.

B. Petitioners did not challenge the "gift ban" as overbroad in the lower court.

Petitioners suggest for the first time in these proceedings that gifts to legislators are a form of speech or an aid to speech and therefore cannot be restricted or prohibited under the First Amendment. This is not the argument presented to or decided by the Eleventh Circuit. Because the question was not "pressed or passed upon" below, a grant of certiorari is not warranted. *See United States v. Williams*, 504 U.S. 36, 41 (1992).

As is clear from the Eleventh Circuit's opinion, petitioners' argument was over the *proper construction* of the statutes prohibiting the giving and accepting of payments to legislators. 525 F.3d at 1078-79. The court construed the Act and held that an "expenditure" (*i.e.*, payment) is unlawful only if made by a lobbyist or principle *and* accepted by a government official. It found the term "indirect" was not vague. "[A] person of common intelligence would understand that it applies to expenditures or compensation paid through a third part." *Id.* at 1079. The petition does not take issue with this construction.

II. Certiorari is Not Warranted Because the Decision of the Eleventh Circuit Does Not Conflict with Any Decision of This Court, the Federal Courts of Appeal, or a State Supreme Court.

The apparent premise of petitioners' argument is that the Act applies to pure issue advocacy by lobbyists. Clearly it does not, and petitioners never adduced any evidence to support the contention that the Act has been so applied. On its face, the definition of "lobbying" does not embrace pure issue advocacy, those who, in *Harriss*' terms, seek to "propagandize the general public." 347 U.S. at 621. Moreover, as *Harriss* made clear, direct pressures on the legislature include those "exerted by the lobbyist themselves or through their hirelings or through an artificially stimulated letter campaign." *Id.* at 620. The petition does not question the right of the legislature and public to know who is behind such pressures.

The relevant holding of the Eleventh Circuit is that the bald assertion that the Act applies to "opinion articles, issue advertisements and letter-writing campaign[ ] from lobbyists on behalf of their clients to the press and public at large for the purpose of influencing legislation or policy" did not in itself suffice to establish substantial overbreadth. 525 F. 3d at 1080. The Eleventh Circuit's decision leaves open both as-applied challenges to the Act and ultimately, depending on what can be proved, a facial challenge. At this point, petitioners have not shown the Act applies to any advocacy not aimed at the legislature and intended to influence its action. Accordingly, the decision of the Eleventh Circuit does not conflict with any of the cases cited by petitioners.

Petitioners also assert that the gift ban conflicts with decisions striking laws that limit campaign contributions. This issue was not "pressed or passed upon" in the lower court proceedings, and accordingly is not properly presented here. *Williams*, 504 U.S. at 41.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

FLORIDA ASSOCIATION OF PROFESSIONAL LOBBYISTS, INC., ET AL.,
Petitioners,
v.
DIVISION OF LEGISLATIVE INFORMATION SERVICES OF THE FLORIDA OFFICE OF LEGISLATIVE SERVICES, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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INTEREST OF *AMICUS*[*]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. Counsel of record for *amicus* has presented oral argument before this Court numerous times, most recently in *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009).

The effect of overbroad campaign finance and lobbying regulation upon the exercise of First Amendment rights is of the utmost importance to *amicus*, as evidenced by the ACLJ's participation as counsel for Emily Echols in *FEC v. McConnell*, 540 U.S. 93, 231-32 (2003), and as *amicus* in *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007).

SUMMARY OF ARGUMENT

The Florida statute upheld by the Eleventh Circuit in *Fla. Ass'n of Prof'l Lobbyists, Inc. v. Div. of Legislative Information Servs. of the Fla. Office of Legislative Servs.*, 525 F.3d 1073, 1080 (11th Cir. 2008) ("*FAPL*"), violates the First Amendment. The statute encompasses protected grassroots issue advocacy, which has been recognized by this Court as deserving of extensive First Amendment protection. *See FEC v. Wis. Right to Life, Inc.*, 551

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[*] Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*'s intention to file this brief. The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

U.S. 449, 470 (2007); *see also United States v. Rumley*, 345 U.S. 41, 47 (1953).

Although compelling government interests may justify regulation of express electioneering, *Wis. Right to Life, Inc.*, 551 U.S. at 478, or direct lobbying, *Rumley*, 345 U.S. at 47, these interests should not be extended to justify regulation of grassroots issue advocacy. The Eleventh Circuit's reliance on *United States v. Harriss*, 347 U.S. 612 (1954), to uphold regulation of issue advocacy is misplaced, as the statute in *Harriss* was narrowly interpreted to apply only to direct contacts with legislators. *Id* at 620.

Additionally, the failure to provide clear, definitive protection for grassroots issue advocacy will undermine the government's interest in avoiding corruption or the appearance of corruption. While large corporations are well equipped to deal with extensive and confusing regulatory requirements, the voices of grassroots issue organizations with limited man-power and funding will be suppressed. This will allow for insiders to more easily influence legislation without strong public opposition, leading to at least the appearance of a more corrupted process.

Finally, if the constitutional problems raised by the Florida statute are not addressed, further impermissible restrictions will inevitably result. Recent advances in technology have made grassroots issue advocacy more prevalent than ever. This fact, coupled with the media attention given to numerous recent corruption scandals, has rendered both traditional lobbying and grassroots issue advocacy

tempting targets for further regulation. It is imperative that this Court provide clear guidance and protection for the core First Amendment freedoms embodied by grassroots issue advocacy.

ARGUMENT

The Florida statute will subject protected forms of grassroots issue advocacy—"such as opinion articles, issue advertisements, and letterwriting [sic] campaigns," *FAPL*, 525 F.3d at 1080—to rigorous and intrusive reporting and disclosure requirements, *id* at 1075. This Court has established a clear distinction between direct lobbying or electioneering and grassroots issue advocacy. *Wis. Right to Life*, 551 U.S. at 481; *Rumley*, 345 U.S. at 47. By restricting protected forms of advocacy without a compelling government interest, the Florida statute violates the First Amendment. With recent advancements increasing the presence of issue advocacy and media attention focused on lobbying scandals, further enactments are inevitable and this Court must provide clear guidance to legislators to protect the First Amendment.

I. The Florida Act Violates the First Amendment.

The Florida statute fails to survive constitutional scrutiny. The statute impermissibly burdens protected forms of grassroots issue advocacy without a sufficiently compelling government interest.

A. Federal Courts have Consistently Recognized the Extensive First Amendment Protections to be Afforded Grassroots Issue Advocacy.

"Political speech, of course, is 'at the core of what the First Amendment is designed to protect.'" *Morse v. Frederick*, 551 U.S. 393, 404 (2007) (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003)); *see also FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007). Likewise, grassroots issue advocacy, whether in the context of issue advertisements, *Wis. Right to Life, Inc.*, 551 U.S. at 449, or publicly targeted grassroots advocacy efforts, *Rumley*, 345 U.S. at 46, is afforded strong protection.

In *Rumley v. United States*, 197 F.2d 166 (D.C. Cir. 1952), *aff'd by* 345 U.S. at 48, the United States Court of Appeals for the District of Columbia Circuit considered a congressional resolution authorizing investigation of "all lobbying activities intended to influence, encourage, promote, or retard legislation." *Id.* at 169. The House Select Committee on Lobbying Activities had broadly interpreted the resolution to allow for the investigation of pamphleteering by citizen groups. Mr. Rumley belonged to an organization that sold and distributed pamphlets and books on public policy issues in an attempt to influence public opinion. He was convicted for failing to produce his organization's records for examination. *Id.* at 172.

In reversing Rumley's conviction, the Circuit Court pointed out the great importance of the "right to influence public opinion . . . by books, pamphlets and other writings" and the First Amendment's

severe limitation on Congress's power to "abridge" such advocacy. *Id.* at 173–74. The court noted the stark contrast between congressional authority to restrict traditional or direct lobbying activities and Congress's lack of authority to regulate communications with the general public. *Id.* at 175. The court proclaimed:

> It is said that lobbying itself is an evil and a danger. We agree that lobbying by personal contact may be an evil and a potential danger to the best in legislative processes. It is said that indirect lobbying by *the pressure of public opinion on the Congress* is an evil and a danger. *That is not an evil; it is a good, the healthy essence of the democratic process.*

Id. at 174 (emphasis added). The Florida Act threatens the "healthy essence of the democratic process" by burdening grassroots issue advocacy with onerous registration and reporting requirements. *See id.*

This Court has also construed legislative enactments to not reach indirect or grassroots advocacy. In *United States v. Rumely*, this Court followed the canon of constitutional avoidance by narrowly interpreting the disputed resolution: "As a matter of English, the phrase 'lobbying activities' readily lends itself to the construction placed upon it below, namely, 'lobbying in its commonly accepted sense,' that is, 'representations made directly to the Congress, its members, or its committees.'" 345 U.S. at 47 (quoting *Rumley*, 197 F.2d at 175). The Court

recognized that legislative attempts to regulate grassroots advocacy would create constitutional problems:

> [G]iving the scope to the resolution for which the Government contends, that is . . . *the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals,* however remote the radiations of influence which they may exert upon the ultimate legislative process, *raises doubts of constitutionality in view of the prohibition of the First Amendment.*

Id. at 46 (emphasis added).

The *Rumely* Court recognized the important distinction between "'lobbying in its commonly accepted sense," *i.e.*, "representations made *directly to the Congress*,'" and attempts "'to saturate the thinking of the community'" through activities directed toward the general public. *Id.* at 47. This contrast focuses on the *identity of the recipient of the communication* (a member of Congress vs. the general public) as opposed to *the speaker's identity*.

Later, in *United States v. Harriss*, 347 U.S. 612 (1954), this Court considered certain provisions of the Federal Regulation of Lobbying Act ("FRLA"). FRLA required registration and certain disclosures by compensated persons who, either alone or through agents, principally engaged in seeking to influence the content, passage, or defeat of legislation. *Id.* at 618-19. Ultimately, FRLA withstood a facial challenge under several provisions

of the First Amendment only because this Court narrowly construed FRLA as limited to persons who intended to "influence the passage or defeat of legislation" "*through direct communication with members of Congress.*" *Id.* at 623 (emphasis added).

While the *Harriss* Court did refer to certain public communications, such as "an artificially stimulated letter campaign," *id.* at 625–26, it did not provide a green light for government regulation of grassroots issue advocacy. *Harriss*, relying upon *Rumely*, emphasized the key difference between direct communications with a member of Congress and communications directed toward the general public. In response to allegations that FRLA might result in the chilling of protected speech, the Court noted that any significant amount of deterrence would be avoided by limiting the statute's application to those engaging in direct contact with legislators. *Id.* at 626. The holding in *Harriss* with respect to the potential violation of the First Amendment was tied to the narrow construction of the statute.

As recently as *Wisconsin Right to Life*, this Court reiterated the First Amendment's broad protection of grassroots issue advocacy. In the context of television advertisements, the Court found that, while the Bipartisan Campaign Reform Act ("BCRA") could prohibit express electioneering advertisements (or the equivalent) near an election day, BCRA was unconstitutional as applied to genuine grassroots issue advertisements. *Id.* at 457. The Court recognized the special status of issue advocacy under the First Amendment and its importance in educating the public. *Id.* at 469. The

Court commented that "'freedom of discussion . . . [to] fulfill its historic function . . . must embrace all issues about which information is needed . . . to enable members of society to cope with the exigencies of their period.'" *Id.* at 474 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)).

As these cases demonstrate, while Congress and state legislatures may regulate traditional lobbying activities, such as face-to-face meetings with legislators, the First Amendment provides robust protection to grassroots issue advocacy. As explained previously, this Court has continually considered the communication's target audience—not its author—to determine the extent of allowable regulation. By contrast, the Florida Act burdens speakers regardless of their target audience and impermissibly treats grassroots issue advocacy as if it were interchangeable with traditional lobbying activities.

B. No Compelling Government Interest Supports the Regulation of Grassroots Issue Advocacy.

When a content-based government regulation directly burdens political speech such as grassroots issue advocacy, that regulation must survive strict scrutiny. *Wis. Right to Life, Inc.*, 551 U.S. at 464. To sustain a challenged regulation, the government must demonstrate that it is the least restrictive means of serving a compelling state interest. *Id.* Though certain government interests have supported the regulation of express campaign advertising and traditional lobbying activities, none

have sustained the regulation of grassroots issue advocacy.

In *Wisconsin Right to Life*, this Court noted that the fact "[t]hat a compelling interest justifies restrictions on express advocacy tells us little about whether . . . [it] justifies restrictions on issue advocacy." *Id.* at 478. Furthermore, "the interests held to justify restricting corporate campaign speech or its functional equivalent do not justify restricting issue advocacy." *Id.* at 457. The Court discounted the proposition that "'the governmental interest in preventing corruption and the appearance of corruption could justify regulating grassroots issue advocacy. *Id.* at 478–79. Although avoiding corruption and the appearance of it justifies some limitations on campaign contributions and electioneering expenditures, this Court properly refused to stretch the anti-corruption interest to justify regulation of issue advocacy. In the words of the Court, issue advocacy is "by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify" its regulation. *Id.*

The Court further rejected the idea that perceived distortions of public opinion created by mass corporate wealth could justify restrictions on issue advocacy. *Id.* at 481. This idea stemmed from the enormous amount of corporate funds which could be spent on express advocacy and electioneering efforts, but did not necessarily reflect popular sentiment. *Id.* at 481 n. 10. However, the Court found that this interest did not extend beyond campaign speech because corporations retained the ability to speak on issues. Therefore, such an

interest could hardly encompass genuine issue advocacy. *Id.* at 480.

The Eleventh Circuit, relying on *Florida League of Professional Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 461 (11th Cir. 1996), proposed that the interests described in *Harriss* are sufficient to justify the burden that the Florida Act places upon grassroots issue advocacy. *FAPL*, 525 F.3d at 1080. In this case and *Meggs*, however, the Eleventh Circuit misinterpreted *Harriss*. The *Harris* Court's recognition of a government interest in "self protection," *Harris*, 347 U.S. at 625, does not justify regulation that reaches far beyond direct lobbying contacts to encompass grassroots issue advocacy.

Moreover, the Eleventh Circuit erred by declining to apply strict scrutiny analysis based solely on the appearance that the *Harriss* Court did not use it. *See Meggs*, 87 F.3d at 460. The *Harriss* Court did not apply a specific level of constitutional scrutiny because no such analysis was necessary. The Court noted repeatedly that its entire discussion was framed by its narrow interpretation of the Act to apply only to direct lobbying contacts. This alone enabled the Act to avoid exacting scrutiny under the First Amendment, rendering any comparison against the government's asserted interests unnecessary. *Harriss*, 347 U.S. at 625–26. Similarly, the Eleventh Circuit's assertion that *Harriss* discounted any potential chilling effect on protected speech, *Meggs*, 87 F.3d at 460–61, failed to appreciate that the discussion in *Harriss* was dependent upon the Act's narrow construction. *Harris*, 347 U.S. at 626. Thus, reliance on *Harriss* to definitively state that the First Amendment allows restriction of indirect

contacts, *FAPL*, 525 F.3d at 1080, especially in the absence of strict scrutiny, is a clear misreading of *Harriss*.

C. The Act is Unconstitutionally Overbroad

The actual or threatened enforcement of the Florida Act will impermissibly deter a "substantial amount" of protected expression, rendering the Act unconstitutionally overbroad. *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003). The Florida Act's broad definitions encompass a large amount of constitutionally protected grassroots issue advocacy. The Eleventh Circuit did not dispute "that lobbying activity, as defined in the Act, encompasses not only direct communications from lobbyists to legislators and state officials . . . but also indirect communications—such as *opinion articles, issue advertisements, and letterwriting* [sic] *campaigns—to the press and public at large*." *FAPL*, 525 F.3d at 1080 (footnote omitted) (emphasis added).

While the Eleventh Circuit recognized that this Court limited its opinion in *Harriss* to encompass only "'contributions and expenditures . . . attempting to influence legislation through *direct communication with Congress*,'" *id.* at 1080 n.8 (quoting *Harriss*, 347 U.S. at 623), it offered no such limitation in interpreting the Florida statute. The court merely proclaimed that "[b]ecause the *First Amendment* allows required reporting of considerably more than face-to-face contact with government officials, we decline to invalidate the Act on its face as substantially overbroad. Instead, we leave 'whatever overbreadth may exist [to] be cured

through case-by-case analysis.'" *Id.* at 1080 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)) (citation omitted).

The Eleventh Circuit's decision is inconsistent with both *Rumely* and *Harriss*. As discussed previously, both decisions recognized an important difference between "'lobbying in its commonly accepted sense,'" *i.e.*, "'representations made *directly to the Congress*, its members, or its committees,'" and attempts "'to saturate the thinking of the community'" through articles, writings, and other activities directed toward the general public. *Rumely*, 345 U.S. at 47; *see also Harriss*, 347 U.S. at 620. Both *Rumely* and *Harriss* focused on *the target audience*, which here, as in *Rumely*, encompasses the general public. While the organization in *Rumely* was a grassroots entity and not a professional lobbying firm, *Rumely*, 345 U.S. at 42, the First Amendment's protection is not lessened by the mere fact that an individual who is hired to aid an organization in its grassroots issue advocacy works as a professional lobbyist. It is the extent to which the targeted form of communication bears a direct relation to corruption or its appearance—not the speaker's occupation—that determines whether the government's regulation is justified.

Additionally, the Act's overbreadth is demonstrated by the previously discussed misreading of *Harriss*. As stated, the lower court's declaration that *Harris* supports the regulation of indirect contacts is incorrect. Therefore, the Eleventh Circuit's acknowledgment that the Florida statute reaches indirect contacts, *FAPL*, 525 F.3d at 1080, demonstrates that the Act is overbroad.

II. The Act Will Negatively Affect Grassroots Issue Advocacy and Significantly Undermine the Government's Interest in Avoiding Corruption.

The Florida Act's requirements will severely limit the ability of smaller grassroots organizations and citizen groups to advocate their positions due to the risk and difficulty involved in compliance. These restrictions will inevitably shift more power to "special interests with deep pockets" who are in a "much better position to comply with complicated, demanding registration and reporting requirements" than ordinary citizens who will be discouraged from "speaking their minds." Jacob Sullum, *Astroturf and Sunlight: The chilling effect of public disclosure requirements*, REASON ONLINE, Aug. 19, 2009, http://www.reason.com/news/show/135508.html.

The compliance difficulties that burdensome regulations pose for small grassroots organizations were evidenced in a 2007 study by the Institute for Justice. Jeffrey Milyo, Institute for Justice, *Campaign Finance Red Tape: Strangling Free Speech & Political Debate*, Oct. 2007, *available at* http://www.ij.org/images/pdf_folder/other_pubs/CampaignFinanceRedTape.pdf. The study "examine[d] whether ordinary citizens [could] successfully perform the duties mandated . . . as a condition for participating in the public debate over ballot measures." *Id.* at 8. The experiments conducted used actual disclosure forms and instructions from California, Colorado, and Missouri.

The study found that all 255 participants would be subject to legal penalties for failing to complete the required forms correctly, *id.* at 4, 15, with a majority reporting the need for more than the allotted time, *id.* at 8. An overwhelming majority of participants reported a negative experience which is not surprising as the required forms are complex with unclear and inaccessible instructions. *Id.* at 10. Additionally, surveyed individuals "were sincerely frustrated in their attempts to complete the disclosure forms – and believed these difficulties would *deter political activity*." *Id.* at 21 (emphasis added). In conclusion, the study found that "ordinary citizens, even if highly educated, have a great deal of difficulty deciphering disclosure rules and forms." *Id.* at 28.

The chilling effect of burdensome registration and reporting requirements is magnified by the fact that grassroots organizations often first learn of them by hearing about the potential penalties that other grassroots organizations face due to inadvertent violations. For example, residents of Parker North, Colorado were sued for violating campaign finance laws by not registering as an "issue committee" after they posted lawn signs and distributed flyers in an attempt to oppose the annexation of their neighborhood. *Id.* at 11. Many organizations will forgo engaging in protected expression rather than face the prospect of potential legal sanctions for unknowing violations of lobbying statutes.

On the other hand, large organizations, especially for-profit ones, are in a much better position to comply with registration and reporting requirements. Several articles have recognized, in

various contexts, the ability of large entities to comply with, and even champion, onerous regulation and have noted the benefits those entities often derive from their requirements. It is commonly believed that government regulation protects the ordinary citizen and that large entities often oppose regulation. Timothy P. Carney, *Individual Liberty, Free Markets, and Peace*, CATO POLICY REPORT, July/Aug. 2006, *available at* http://www.cato.org/research/articles/cpr28n4-1.html. However, many large corporations are often the biggest proponents of extensive government regulation. For example, Enron was a staunch supporter of extensive energy regulation rooted in environmentalism. *Id.* Philip Morris has often championed regulations on tobacco advertising which would likely cripple its smaller competitors through the costs of compliance and legal services. *See* David Ress, *FDA Regulation Could Benefit Big Tobacco, Experts Say*, RICHMOND TIMES-DISPATCH, Aug. 10, 2009, *available at* http://www2.timesdispatch.com/rtd/business/health_med_fit/article/TOBA10_20090809-215404/285079/.

These large entities employ massive resources in their lobbying efforts. In only three months, several pharmaceutical companies each spent between three and six million dollars on health care lobbying. Andrea Seabrook & Peter Overby, *Drug Firms Pour $40 Million into Health Care Debate*, NAT'L PUBLIC RADIO, July 23, 2009, *available at* http://www.npr.org/templates/story/story.php?storyId=106899074. According to the Center for Responsive Politics, top lobbying expenditures so far in 2009 range from 6 to 26 million dollars, with

almost all of the top spenders being major corporations or their representatives. Opensecrets.org, *Lobbying Top Spenders*, http://www.opensecrets.org/lobby/top.php?showYear=2009&indexType=s (last visited Aug. 27, 2009). Corporations with massive resources have no problem complying with administrative and recording costs and already employ numerous attorneys who are capable of ensuring compliance. Moreover, these entities have extensive experience with the intricacies of governmental bureaucracy and are not easily deterred by the threat of penalties or more onerous regulation.

By contrast, most public interest organizations, community groups, and citizens' advocacy groups are relatively small and rely on either private funds or donations, which in many cases leaves them operating on shoestring budgets. Many of these groups do not possess the legal expertise or wealth of experience necessary to comply with extensive government regulation. Intrusive lobbying regulation not only results in large administrative costs but also provides a deterrent to expression due to the specter of negative government action. The inability of citizens' groups and advocacy organizations to deal with the necessary requirements will severely decrease their willingness to enter the public discussion and place them at a greater disadvantage vis-à-vis large corporations.

Deterring grassroots organizations from encouraging members of the public to contact elected representatives about issues they are concerned about would actually undermine the government's interest in avoiding corruption or its appearance.

The deterrent effects imposed by more extensive regulation will "limit the public's access to 'an uninhibited marketplace of ideas' dealing with public policy issues." Jay Alan Sekulow & Erik M. Zimmerman, *The Law of Lobbying: Weeding Them Out by the Roots: The Unconstitutionality of Regulating Grassroots Issue Advocacy*, 19 STAN. L. & POL'Y REV. 164, 178 (2008).

This Court has recognized that the interest in avoiding corruption is based on the need to shed light upon large lobbyist expenditures or corporate contributions that benefit politicians. This pursuit of transparency sought to avoid the apparent existence of a political *quid pro quo*, *Wisconsin Right to Life*, 551 U.S. at 478, which could give the contributors the actual or apparent ability to circumvent the will of the people. Conversely, "[r]egulation that would hamper efforts to inform and motivate citizens to contact Congress will increase the power of professional lobbyists [and corporate insiders] inside [Washington]." Sekulow & Zimmerman, 19 STAN. L. & POL'Y REV. at 175. To properly serve its interests, the government should facilitate rather than inhibit citizen participation and contact with elected officials which is often stimulated by grassroots advocacy groups. This has been properly recognized as "the healthy essence of the democratic process." *Rumley*, 197 F.2d at 174. Legislation such as the Florida Act hinders this process and allows the growth of insider influence to "impede the effectual exercise of the people's power." *Id.*

III. A Failure to Address These Important Constitutional Concerns Will Result in More Extensive Unconstitutional Restrictions.

If the constitutional concerns raised by the Florida statute are overlooked, legislatures will undoubtedly continue to expand the regulation of grassroots issue advocacy. Recent developments in communications technology, the marked increase in advocacy groups, the unpopularity of lobbyists, and the political nature of the topic make further expansive lobbying regulation all the more likely. Without clearly defined limitations on the permissible extent of lobbying regulations, it is very likely that future regulations, like the Act at issue here, will be imposed upon grassroots issue advocacy.

The idea of citizens coming together to "lobby" their government regarding issues of concern has been a fundamental part of the American experience since the founding. R. Eric Peterson, *Lobbying Reform: Background and Legislative Proposals, 109th Congress*, CRS REPORT FOR CONGRESS 1–2 (Mar. 23, 2006). However, in recent decades, the number of organized interest groups has notably increased. *Id.* Also, the increase in the availability of technology, especially the Internet, has made issue advocacy easier than ever before. No longer do groups of citizens championing particular causes have to rely on face-to-face meetings or printed newsletters to advocate their views. The Internet allows advocacy groups to widen their sphere of influence by passing information to like-minded persons all over the nation, which provides public

interest and other advocacy groups with more visibility than ever before.

Recent scandals surrounding the conduct of lobbyists have also increased publicity and debate over the issues of improper influence and corruption. One glaring example is the conviction of former Washington lobbyist Jack Abramoff on corruption and tax charges. Abramoff was accused of numerous improper actions including showering government officials with lavish gifts and taking members of Congress to Scotland for golf outings. The widely publicized fall-out from the Abramoff scandal led to a media outcry and the subsequent conviction of several government officials. Neil A. Lewis, *Abramoff Gets Four Years in Prison for Corruption*, N.Y. TIMES, Sept. 4, 2008, *available at* http://www.nytimes.com/2008/09/05/washington/05abramoff.html?_r=1.

Allegations surrounding improper ties to lobbyists also became an issue in the 2008 Presidential campaign, Jim Rutenberg, Marilyn W. Thompson *et al.*, *For McCain, Self-Confidence on Ethics Poses its Own Risk*, N.Y. TIMES, Feb. 21, 2008, *available at* http://www.nytimes.com/2008/02/21/us/politics/21mccain.html, and have even haunted the executive branch, *Obama Criticized after Lobbyists Banned from Dem Fundraiser but Allowed to Give Later*, FOX NEWS, June 18, 2009, http://www.foxnews.com/story/0,2933,527269,00.html (last visited Aug. 28, 2009). President Obama issued a highly publicized executive order proposing to limit the connection between professional lobbying and executive branch service and otherwise placing

stricter ethics limits on contacts. Exec. Order No. 13490, 74 Fed. Reg. 4673 (Jan. 26, 2009). The increase in the number and scope of advocacy organizations and the technology that makes them more effective, coupled with the recent negative attention to lobbying's influences on government, make further restriction a virtual certainty.

It is crucial that any future restrictions be properly and carefully crafted. Some allege that organizations improperly circumvent current requirements by appealing to the public through "stealth" campaigns, influencing citizens to contact elected officials. Peterson, *supra*, at 2. Those in favor of broader regulation allege that existing lobbying regulations and disclosure requirements are insufficient to curb so-called "astroturf" campaigns. *Id.* They fear that organizations seeking to remain anonymous will form "stealth" coalitions and supposed separate organizations to "shield their lobbying activities." R. Eric Peterson, *Lobbying Disclosure: Themes and Issues, 110th Congress*, CRS REPORT FOR CONGRESS 2 (May 29, 2007).

Given the increasing call for more intrusive regulation that targets grassroots issue advocacy, new regulations will raise fundamental constitutional concerns. Without clear limitations, these regulations are likely to violate the First Amendment—as the Florida Act does—by subjecting a wide range of grassroots issue advocacy to burdensome regulation. This Court should grant review and set forth a bright-line rule upholding the First Amendment's robust protection of grassroots issue advocacy.

CONCLUSION

Congress and state legislatures must be reminded of the extent of the First Amendment's protection of grassroots issue advocacy. This Court should grant review and reverse the judgment of the Eleventh Circuit.

Respectfully submitted,

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No. 09-154

In The Supreme Court of the United States

FLORIDA ASSOCIATION OF PROFESSIONAL LOBBYISTS, INC., a Florida Not for Profit Corporation; GUY M. SPEARMAN, III, a Natural Person; SPEARMAN MANAGEMENT COMPANY, a Florida Corporation; RONALD L. BOOK, a Natural Person; RONALD L. BOOK, P.A., a Florida Professional Association,

Petitioners,

vs.

DIVISION OF LEGISLATIVE INFORMATION SERVICES OF THE FLORIDA OFFICE OF LEGISLATIVE SERVICES, a Florida State Agency; THE FLORIDA COMMISSION ON ETHICS, an Independent Constitutional Commission; JEFF ATWATER, as President of the Florida Senate; and LARRY CRETUL, as Speaker of the Florida House of Representatives,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF AMICUS CURIAE OF THE FLORIDA RESTAURANT & LODGING ASSOCIATION, INC., IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

As one of the state's oldest non-profit trade organizations, established in 1946, The Florida Restaurant & Lodging Association, Inc. ("FRLA"), is privileged to represent the interests of over 10,000 restaurant and lodging establishments located throughout the state of Florida, as well as many of their suppliers and service providers. Collectively, the hospitality industry is the state's largest employer, generating $57 billion annually and comprising 20% of Florida's economy. Each year, the hospitality industry pays over $3.4 billion in sales tax revenue to the state of Florida.

In addition to advocating on behalf of Florida's hospitality industry before the legislative and executive branches of state government, one of FRLA's primary missions is to provide education and training to the over 900,000 hard-working men and women employed in the many hospitality businesses serving Florida's residents and visitors. FRLA provides food handler and food manager education for the state's restaurant employees and partners with a national

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[1] All counsel of record received notice of *amicus*' intention to file this brief at least ten days before this brief was due, and all counsel of record have indicated their respective clients' consent and/or lack of objection to the filing of the brief. *Amicus* states that no portion of this brief was authored by counsel for a party and that no person or entity other than *amicus* or their counsel made a monetary contribution to the preparation or submission of this brief.

trade association to provide lodging management training to personnel in Florida's lodging establishments. FRLA also funds and manages an educational foundation in which over 20,000 high school students participate in training programs designed to introduce them to the hospitality industry.

With respect to the case that is the subject of the pending petition for writ of certiorari before this Court, FRLA's members have been, and continue to be, directly and negatively impacted by the Florida gift ban law under challenge in this case. In particular, the law has resulted in a significant decrease in income for hospitality establishments in Florida's capitol city, Tallahassee. A 2007 study titled "Estimated Economic Impact of the Florida Gift Ban Law upon Tallahassee/Leon County, Florida," by Florida State University economists Dr. Mark A. Bonn and Dr. Julie Harrington (attached as an appendix), found that the Florida gift ban law cost Tallahassee and the surrounding area more than $4.1 million in hospitality and related spending during just the brief 60-day length of Florida's regular legislative session.

ARGUMENT

The position of the FRLA is that the complete and total gift ban in Florida imposed by the Florida gift ban law "does not aim specifically at evils within the allowable area of State control, but on the contrary, sweeps within its ambit other activities that

in ordinary circumstances constitute an exercise of freedom of speech." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). The record compiled by the Florida Legislature during its deliberations on the Law contain no evidence whatsoever to support the contention that an absolute gift ban is necessary to maintain the integrity of the state's basic governmental processes. The decision to ban all expenditures by lobbyists was political in nature and was not closely drawn to match the goal of preventing public corruption.

While now prohibited by law from buying a public official a cup of coffee, from providing them with an educational book or video, or from giving them anything with a discernible economic value, lobbyists can still contribute up to $500 to a candidate's campaign per election cycle, contribute up to $500 per election cycle to a political committee supporting the candidate, contribute an unlimited amount of money to a political party, and contribute an unlimited amount of money to a "committee of continuous existence" or other "527" political entity affiliated with the candidate. Fla. Stat. §§ 106.08(1)(a), 106.04.

Furthermore, while the gift ban prohibits a lobbyist from buying dinner for a legislator, the lobbyist can contribute to a political party, a political committee, or a committee of continuous existence, which can itself then pay for the legislator's dinner. Against this backdrop, no evidence exists that a

blanket gift ban achieves the state's objective of preventing corruption or the appearance of same.

Another indication that the law is overbroad is the fact that the law applies to direct and *indirect* gifts. Lobbyists are therefore banned from contributing to grassroots lobbying organizations or nonprofit organizations associated with or favored by public officials. The gift law could therefore have a disparate impact on the ability of these organizations to mobilize and participate in the political process.

If the Florida law at issue in this case had simply set some maximum value on the cost of a gift or meal a lobbyist or its client could lawfully give to a public official, e.g., $100, this Court would be much harder pressed to "determine with any degree of exactitude the precise restriction necessary to carry out" the Florida Legislature's anticorruption objective, i.e., whether $50, $100, or $150 is the "right" amount. *Randall v. Sorrell*, 548 U.S. 230, 248 (2006). Here, however, the Florida Legislature did not produce any evidence that a total gift ban is necessary to achieve this objective.

One's ability to spend money in the context of speaking to public officials is a fundamental right that should not be restricted unnecessarily. In its landmark case, *Buckley v. Valeo*, 424 U.S. 1 (1976), the central holding is that "spending money on one's own speech must be permitted." *Colorado Republican Federal Campaign Committee v. Federal Election Comm'n*, 518 U.S. 604, 627 (1996). While *Buckley*

specifically dealt with campaign contributions, expenditures made by lobbyists or their clients in furtherance of communicating with government officials on matters of great public importance should be protected for similar reasons.

This Court has long recognized the fundamental right to engage in political speech. Political speech comes in many forms. It is well established that political speech exists in the form of campaign contributions and campaign expenditures, and similar constitutional protections should exist for expenditures made by lobbyists or their principals in their pursuit of political dialogue with public officials. Ordinary citizens and businesses alike use lobbyists to represent their interests at the state capitol. Personal appearances by these citizens or businesses in Tallahassee during the state's legislative session are frequently impractical in light of the time it would take away from the demands of their already full daily schedules. By hiring lobbyists, these citizens and businesses can seek to provide input into government decision-making without disrupting their personal and professional lives. That political speech, whether through an intermediary such as a lobbyist or not, is protected by the First Amendment.

This Court has upheld limits for political contributions, while recognizing that sometimes limits may cause "more harm to protected First Amendment interests than their anticorruption objectives could justify." *Randall*, 548 U.S. at 247-248. When it comes

to limiting campaign contributions, it is well established that some lower limit exists and they cannot be completely prohibited. *Id.*

Similarly, a complete gift ban is overbroad and facially invalid. The blanket prohibition of the gift ban has had a chilling effect on the ability of lobbyists and their principals to communicate with public officials on matters of great public importance. Legislators and public officials routinely maintain extraordinarily full schedules. Sometimes, the only opportunity for a legislator or public official to meet with a lobbyist may be during a meal either before or after the traditional work day. However, with a complete gift ban in place, many public officials hesitate to even enter a restaurant with a lobbyist for fear of spurring an ethics complaint based upon the appearance that they might be violating the gift ban. This chilling effect can eliminate the opportunity for the lobbyist's client to have its views relayed to the public official and impinges on the ability of that public official to gather relevant information on issues of public concern.

CONCLUSION

For all the reasons explained above, the FRLA urges this Court to grant the petition for a writ of certiorari.

Dated: September 8, 2009

Respectfully submitted,

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Estimated Economic Impact of the Florida Gift Ban Law upon Tallahassee/Leon County, Florida

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Introduction & Methodology

The Florida Gift Ban Law is an act "relating to registration and reporting requirements for legislative lobbyists and lobbyist of the executive branch and Constitution Revision Commission," which was approved in December 2005 and went into effect January 1, 2006. The Florida Gift Ban Law consists of requirements as such:

- ☐ Principal[1] upon the registration of the principal lobbyist to identify the principal's main business.
- ☐ Lobbying firm and principal must maintain certain records and documents for a specified period.
- ☐ Lobbying firm has to file quarterly compensation[2] reports.
- ☐ Lobbying firm has to report certain compensation information in dollar categories and specific dollar amounts.
- ☐ Prohibiting lobbying expenditures, except for certain floral arrangement and celebratory items.
- ☐ Prohibiting principals from providing lobbying compensation to any individual or business entity other than a lobbying firm.

The purpose of this study was to determine the extent that the Florida Gift Ban Law has impacted Tallahassee/Leon County businesses during legislative session occurring in March and April, 2007. In an effort to achieve the study objectives, a data collection

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[1] Principal: refers to the person, firm, corporation, or other entity that has employed or retained a lobbyist.

[2] Compensation: refers to a payment, distribution, loan, advance, reimbursement, deposit, salary, fee, retainer, or anything of value provided or owed to a lobbying firm, directly or indirectly, by a principal for any lobbying activity.

instrument was developed specific to the study in order to estimate the total economic impact of the Florida Gift Ban Law. In order to capture responses from businesses directly affected by the Gift Ban Law personal interviews were randomly conducted with Tallahassee/Leon County business owners and operators representing very specific economic categories of Leon County as categorized by the IMPLAN Professional® software program, a widely accepted economic model used throughout the U.S. by many counties conducting economic value research. The economic categories as reported in IMPLAN used for this study represented fourteen sectors and a total of 139 businesses. From this list, thirty-three percent (n=46) of these businesses were contacted at random. A total of 36 businesses agreed to provide data based upon confidentiality of the information. This resulted in a usable response rate of twenty-six percent. The following business categories were represented in the study:

1. Transit and Ground Transportation (Taxi Services)
2. Transit and Ground Transportation (Limousine Services)
3. Transit and Ground Transportation (Rental Auto Services)
4. Scenic and Sightseeing Tours
5. Couriers and Messengers (Couriers/ Delivery)
6. Couriers and Messengers (Florist)

7. Miscellaneous Stores Retail (Bars & Pubs)
8. Miscellaneous Stores Retail (Lounges)
9. Specialized Design Services (Event Planning)
10. Specialized Design Services (Meeting Planning Services)
11. Specialized Design Services (Party Planning Services)
12. Specialized Design Services (Party Supplies)
13. Hotels and Motels
14. Food Services (Restaurants)

Since the enactment of the Florida Gift Ban Law, numerous and continuous claims of lost business revenue by local Leon County business owners have been expressed publicly. The main cause of this situation is attributed to the inability of lobbyists to expend their business dollars on services related to lobbying legislators using establishments and businesses owned and managed by local service providers. Although activity related to this situation occurs throughout the year, most of these dollars are typically spent during legislative session. Spending creates what is known as the multiplier effect, whereby in this application, lobbyist dollars transgress throughout the entire local economy. This becomes possible, for instance, as initial lobbying dollars are spent in Leon County places of business

for legislative lobbying purposes in such establishments as local restaurants, nightclubs, catering services, hotels, etc. Lobbying dollars that are received by local employees working in our area businesses are subsequently spent by our paid workforce at many other places of businesses throughout the county (i.e. grocery stores, gas stations. shopping malls, etc., etc.) This behavior starts a chain reaction of dollars that are virtually turning over, or multiplying, within our community. In the case of Leon County, each lobbyist dollar spent creates a multiplier of 1.45, as calculated by the IMPLAN software program. This indicates that for every $1.00 entering our economy contributed by lobbyists for paid activities related to lobbyist spending, it produces a total positive income change of $1.55. This study analyzed lobbyist spending as a direct result of the Florida Gift Ban Law and determined that **Tallahassee/Leon County lost more than $4.1 million, or slightly more than $500,000 each week of session due to lack of total lobbyist spending during March and April of 2007.**

Related Evidence

Many business owners and operators expressed their concern with lost business opportunities due to the Gift Ban Law above and beyond those absolute dollars they were able to document. In essence, the inability to introduce local business products and services to potentially new customers through lobbyist spending for events and other activities is

immeasurable, but indeed exists. Historically, when lobbyists prior to the Gift Ban Law provided services, many first time users of local products and services experiencing satisfaction from service providers, returned as repeat customers. There was an indirect marketing effect created through positive word of mouth by new customers creating additional business for many of the responding companies. Although this cannot be validated without further research, we believe it to be credible information. It should be noted that the economic analysis for this project took a more "conservative" approach and did not examine or include this intangibility factor. Satisfied customers lead to lifetime relationships that create profits and revenues for businesses. Without the ability to provide access to local businesses through lobbyist spending, economic loss is certain to some unknown degree at this time.

IMPLAN Economic Impact Analysis

The IMPLAN program is widely accepted by researchers because it uses multipliers for specific outputs to estimate impact visitor spending has upon labor, income and employment. The economic impact for the Florida Gift Ban on the Tallahassee/Leon County region calculated by using IMPLAN is summarized in Table 1 below. The total impact on output decline (Direct + Indirect + Induced) of all lobbying expenditures during March and April 2007 is more than $4.1 million. According to IMPLAN, the $4.1 million output decline would have supported

74 existing employees at an average annual compensation loss of $17,973 ($1.33/74) assuming this trend continues year-round.

Table 1

Florida Gift Ban Economic Impact Analysis for Legislative Session, 2007

Gift Ban IMPLAN Analysis[3]		**Direct**	**Indirect**	**Induced**	**Total**	**Multiplier**
All Business Sectors	Output ($mil)	$3.02	$0.57	$0.55	**$4.14**	1.45
	Labor Income ($mil)	$0.97	$0.18	$0.18	**$1.33**	1.55
	Employment	63	5	6	**74**	1.59

[3] Florida Gift Ban Economic Analysis conducted with 2004 Leon County IMPLAN data.

Appendix 1

Glossary of Economic Impact Terms

- *Direct effect:* production changes associated with changes in demand for the good itself; it is an initial impact on the economy.
- *Employee compensation:* wage and salary payments as well as benefits, including health and life insurance, retirement payments and other non-cash compensation.
- *Employment multiplier:* for every million dollar change in final-demand spending (direct output), the change in employment (jobs).
- *Indirect effect:* the secondary impact caused by changing input needs of directly affected industries (e.g., additional input purchases to produce additional output).
- *Induced effect:* caused by changes in household spending due to the additional employment generated by direct and indirect effects.
- *Labor income:* consists of employee compensation and proprietary income.
- *Labor income multiplier:* for every dollar change in final-demand spending (direct output), the change in income received by households.
- *Output:* industry output is a measure of the value of goods and services produced in the study area.
- *Output multiplier*: An output multiplier for a sector is defined as the total production in all sectors of the economy that is necessary to satisfy a dollar's worth of final demand for that sector's

output (Miller and Blair, 1985). In other words, every dollar change in final-demand spending (direct output) changes the total value of output in all sectors.

- *Proprietary income:* consists of payments received by self-employed individuals as income. This includes income received by private business owners, doctors, lawyers and so forth.

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(3)

No. 09-154

Supreme Court, U.S.
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In The
Supreme Court of the United States

FLORIDA ASSOCIATION OF PROFESSIONAL LOBBYISTS, INC., et al.,

Petitioners,

v.

DIVISION OF LEGISLATIVE INFORMATION SERVICES OF THE FLORIDA OFFICE OF LEGISLATIVE SERVICES, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE FOUNDATION FOR FREE EXPRESSION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF AMICI[1]

The Foundation for Free Expression ("FFE"), as *amicus curiae*, respectfully submits that the Petition for Writ of Certiorari should be granted.

FFE is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. FFE's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of New York Times bestseller, *Tales from the Left Coast: True Stories of Hollywood Stars and Their Outrageous Politics*, and *Hollywood Nation: Left Coast Lies, Old Media Spin, and the Revolution*. Mr. Hirsen has taught law school courses on constitutional law.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Americans have a vital interest in safeguarding their cherished, time-honored rights to associate and petition the government for redress of grievances without fear of retaliation or prosecution. A representative form of government stands on the ability of citizens to communicate effectively with their

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[1] Counsel of record for all parties have consented to the filing of this brief and have received notice at least ten (10) days prior to the due date of *amicus curiae*'s intention to file this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

elected legislators who will vote on legislation concerning the issues that impact their lives.

Recent headlines exemplify the importance of preserving these rights. The federal government has proposed major health care reform. Citizens across the country have organized to voice their opinions and concerns on both sides of the issue. People gather to talk and they disseminate information over the internet. But in early August 2009, the White House began to solicit reports to an e-mail address, flag@whitehouse.gov, in order to collect data about allegedly "fishy" information on the web. Because of grave concerns about the First Amendment and the Privacy Act, the Association of American Physicians & Surgeons, Inc. and the Coalition for Urban Renewal & Education recently joined forces to file suit against the Obama Administration in the U.S. District Court for the District of Columbia. *AAPS et. al. v. Executive Office of the President*, Civil Action No. 09-1621-EGS, (D.D.C. filed Aug. 26, 2009), *available at* http://www.aapsonline.org/aaps-eop-complaint.pdf. Health care is a vitally important issue to every American. If "the people" cannot discuss their questions and voice their opinions to one another and their representatives--without fear of being "reported" to the federal government--the First Amendment is in dire straits.

This newly filed federal case poses issues similar to those raised in the Petition. Speech is chilled when people are compelled to make disclosures, whether they are "reported" to a White House e-mail address or required to register with the state and make extensive disclosures of financial transactions and personal data. Both situations implicate the right to associate and

speak freely with elected officials concerning pending legislation.

I. THIS COURT SHOULD GRANT REVIEW TO HALT TWO TROUBLING TRENDS: EXPANDING REGULATION OF PROTECTED POLITICAL SPEECH AND JUDICIAL REDRAFTING TO SALVAGE STATUTES THAT ARE OVERLY BROAD OR VAGUE.

The troubling *McConnell* ruling upset considerable precedent by blurring the line between express advocacy and issue advocacy, calling it a "line in the sand drawn on a windy day." *McConnell v. FEC*, 540 U.S. 93, 126, n. 16 (2003). The *McConnell* Court went so far as to deny that there is any constitutional right to engage in issue advocacy. *Id.* at 192-193. This decision addressed political candidates but its implications spill over into the lobbying arena, where a line is needed to distinguish direct contacts with legislators from the myriad of other activities where ordinary citizens communicate their views about the issues that form the subject matter of legislation. Issue advocacy conveys information and educates. That information may focus on a legislative issue, take a position, and urge others to contact public officials. *Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 127 S.Ct. 2652, 2667 (2007). Nevertheless, *McConnell* escalated the troubling trend toward increased regulation of political speech generally--including pure issue advocacy.

A. Legislatures Have Vastly Expanded Disclosure Requirements And Other Regulations That Burden Even *Indirect* Political Activities.

Government regulations cast an ever wider net over political speech, encompassing *independent* expenditures and *indirect* attempts to influence legislation that pose no significant threat of corruption and serve no compelling government interest. The pending *Citizens United* case concerns core political speech about candidates. *Citizens United v. Fed. Elections Comm'n,* No. 08-205 (U.S. filed Aug. 14, 2008). This new petition concerns speech *to* those candidates, once elected, about the important public issues they will address when they vote on legislation. This Court should address both aspects of political speech to guard the First Amendment rights of American citizens. In a representative government, the people must be able to communicate freely with those they have elected to represent them as well as other members of the public who share similar concerns.

The first issue set forth in the Petition shows the breadth of the problem. Disclosures are mandated even for "opinion articles, issue advertisements, and letter writing campaigns"--ordinary components of free speech that do not necessarily involve any direct contact with legislators. What if an attorney is retained to draft an academic article or "white paper" supporting a position relevant to pending legislation? This could be deemed an "opinion article" subject to disclosure. Even letter writing campaigns generated within the boundaries of a voluntary association have been captured by overreaching disclosure

requirements, trampling classic First Amendment rights of speech and association. *Minnesota State Ethical Practices v. Nat'l Rifle Ass'n*, 761 F.2d 509 (8th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986).

A Ninth Circuit case earlier this year illustrates the chilling impact of imposing disclosure regulations on grassroots lobbying. *Canyon Ferry Baptist Church v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009). A small church was classified an "incidental political committee" under Montana law, subject to extensive disclosures. A church member used her own paper to make less than fifty copies on the church's copier of a petition to collect signatures to place a proposed constitutional amendment on the ballot in November. The church also broadcast a film, "Battle for Marriage," in connection with its regular Sunday evening service. The service was open to the public, and five radio stations aired public service announcements about the film without charge to the church. The church also photocopied and distributed fliers about the film, using bulletin inserts and its lobby. The petition was circulated among church attendees one Sunday to collect signatures. There was no express advocacy for any political candidate--only classic issue advocacy on a matter of serious concern to the church and its members. The Ninth Circuit held that the church's First Amendment rights had been violated. *Id.* at 1028. This case demonstrates both the stifling effect of disclosure laws and the trend toward increasingly burdensome regulation of ordinary political speech. If the nominal, one-time expenditures of a small church can trigger extensive disclosure requirements and require litigation in federal court, the First Amendment is in trouble.

B. Courts Sometimes Engage In Extensive Rewriting In Order To Salvage Laws That Burden Indirect Political Speech.

There is an equally troubling trend in the courts to facially uphold regulations that burden independent political expenditures or indirect lobbying activities. But often they can only do that through a cut-and-paste job, extensively revising the statutory language and creating uncertainty for future litigants.

The trend dates back many decades. In *Rumely*, this Court wisely concluded that the Regulation of Lobbying Act could not compel the secretary of the Committee for Constitutional Government (CCG) to disclose to a congressional committee the names of those who made bulk purchases of its books for further distribution. The CCG distributed printed material in order to indirectly influence legislation. *United States v. Rumely,* 345 U.S. 51 (1953). In order to reach its conclusion, this Court construed the phrase "lobbying activities" to mean "representations made directly to the Congress, its members, or its committees," excluding attempts "to saturate the thinking of the community." *Id.* at 47. But the Act expressly applied to all persons soliciting or receiving money to be used principally "to influence, *directly or indirectly*, the passage or defeat of any legislation by the Congress of the United States." 2 U. S. C. § 266 (b). *Id.* at 54 (emphasis added). The Court rewrote the statute in order to save it.

Similar revisions occurred the next year in *United States v. Harriss*, 347 U.S. 612 (1954). The Court restricted the reach of the Federal Regulation of Lobbying Act, 2 U.S.C.S. §§ 261-270, to direct

communications with members of Congress. But as Justice Douglas pointed out in his dissent, words had to be "added and subtracted" from the Act "to produce that result" because it was specifically applicable to funds solicited, collected, or received "to influence, *directly or indirectly*, the passage or defeat of any legislation" by Congress. *Id.* at 629 (Douglas, J., dissenting) (emphasis added).

> The words "direct communication with Congress" are not in the Act. Congress was concerned with the raising of money to aid in the passage or defeat of legislation, whatever tactics were used. *But the Court not only strikes out one whole group of activities -- to influence "indirectly" -- but substitutes a new concept for the remaining group -- to influence "directly."* To influence "directly" the passage or defeat of legislation includes any number of methods -- for example, nationwide radio, television or advertising programs promoting a particular measure, as well as the "buttonholing" of Congressmen. To include the latter while excluding the former is to rewrite the Act.
>
> *Id.* at 631 (Douglas, J., dissenting) (emphasis added)

Not all courts have followed the revisionist tactics of *Rumely* and *Harriss*. For example, the Eighth Circuit declined to rewrite a disclosure statute it found "easy to understand," in spite of its burden on pure issue advocacy. *Minnesota Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106 (8th Cir. 2005). The Fourth Circuit invalidated a statute imposing intrusive reporting requirements on pure issue

advocacy--refusing to rewrite it by striking a portion of the statutory "political committee" definition. *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999). More recently, the Fourth Circuit again struck down burdensome reporting requirements for the same issue advocacy group. *North Carolina Right To Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008).

Legislatures and courts both need guidance from this Court in order to return clarity and simplicity to the First Amendment. The current state of affairs "blankets with uncertainty" the entire field of campaign politics, "compelling the speaker to hedge and trim." *North Carolina Right to Life, Inc. v. Bartlett, supra*, 168 F.3d at 713, citing *Thomas v. Collins,* 323 U.S. 516, 535 (1944).

II. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE STANDARD APPLICABLE TO DISCLOSURE REQUIREMENTS FOR CORE POLITICAL SPEECH.

This Court has long recognized the high hurdle that legislators must jump to burden First Amendment liberties. Any such attempt at restriction:

> ...must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly

> discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.
>
> *Thomas v. Collins, supra,* 323 U.S. at 530

Moreover, in drawing lines between regulable and protected expression, courts must err on the side of protecting speech rather than suppressing it. *Fed. Election Comm'n v. Wisc. Right to Life, Inc. supra,* 127 S.Ct. at 2559.

But the bar has been lowered and clarification is badly needed. In order to justify restrictions on indirect lobbying, the Eleventh Circuit relied heavily on one of its own earlier decisions that expressed uncertainty about this Court's standards:

> Some disagreement has appeared lately among members of the Supreme Court on exactly how high the threshold for facial invalidation should be set. As we understand it, some Justices interpret Supreme Court precedent to indicate that a statute is not facially invalid unless there is *no* set of circumstances in which it would operate constitutionally; others contend the cases require only that a statute would operate unconstitutionally in *most* cases.
>
> *Fla. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 459 (11th Cir.1996)

The *Meggs* ruling also declared that *Harriss* failed to apply strict scrutiny to lobbying restrictions--but found

the government had "sufficient" interests. *Id.* at 460. This confusion in the Eleventh Circuit clashes with established standards of this Court. A law that burdens speech should be invalidated if it "punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *Virginia v. Hicks*, 539 U.S. 113, 119-120 (2003), citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

A. Disclosure Requirements Should Be Subjected To Exacting Scrutiny And Struck Down Because The Governmental Interest In "Self-Protection" Is Not Compelling.

Where legislation facially burdens First Amendment rights, the normal presumption of constitutionality should operate within a much narrower scope. *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4 (1938). A rational basis is inadequate to justify such burdens. Although *Carolene Products* did not expressly address the level of scrutiny required for "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," it did enumerate other constitutional rights and case citations suggesting that exacting scrutiny would most likely be appropriate. *Id.* at 152, n. 4. Even the Eleventh Circuit has admitted that facial challenges are more likely to succeed where First Amendment rights are implicated. *Fla. League of Prof'l Lobbyists, Inc. v. Meggs, supra*, 87 F.3d at 459, n. 2.

In spite of the uncertainty that *Meggs* alleged concerning this Court's threshold for facial challenges,

there has been repeated affirmation that compelled disclosures can create significant encroachments on First Amendment rights and must therefore survive exacting scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 64, 68 (1976); *Davis v. FEC*, 128 S. Ct. 2759, 2774-2775 (2008). The invasion of privacy is substantial where financial data is required, because "financial transactions can reveal much about a person's activities, associations, and beliefs." *Buckley v. Valeo, supra*, 424 U.S. at 66, citing *California Bankers Assn. v. Schultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring). Compelled disclosures of political associations and beliefs, similarly, "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 91 (1982), citing *Buckley v. Valeo, supra*, 424 U.S. at 64. The Florida statutes (§§ 11.045 and 112.3215) require extensive disclosures concerning both lobbyists and the speakers they represent--disclosures about financial transactions as well as political associations and beliefs. Exacting scrutiny is desperately needed.

When the government abridges fundamental liberties, it is always with the noblest of objectives--"dictators promise to bring order, not tyranny" and "zealous policemen conduct unlawful searches in order to put dangerous felons behind bars." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 692 (1990) (Scalia, J., dissenting). Lobbying restrictions are no exception.

The Eleventh Circuit asserted that legislators have a compelling interest in self-protection. *Fla. Association of Profl Lobbyists, Inc. v. Division of*

Legislative Information Services, 525 F.3d 1073, 1080 (11th Cir. 2008). *Harriss*, similarly, defended the Lobbying Act as a means for elected representatives to evaluate the pressures on them so that "special interest groups masquerading as proponents of the public weal" would not drown out the voice of the people. *United States v. Harriss, supra,* 347 U.S. at 625. That seemingly honorable goal was echoed thirty years later in *Minnesota State Ethical Practices v. Nat'l Rifle Ass'n, supra,* 761 F.2d 509. *Meggs* went so far as to proclaim that the governmental interests are even more compelling for indirect lobbying where the sources are more difficult to identity. *Fla. League of Prof'l Lobbyists, Inc. v. Meggs, supra,* 87 F.3d at 461. The Eleventh Circuit reiterated that questionable conclusion in the current case. *Fla. Association of Prof'l Lobbyists, Inc. v. Division of Legislative Information Services, supra,* 525 F.3d at 1080.

But this Court credits the people of America's democracy with intelligence. There is "no such thing as too much speech" because "the people are not foolish but intelligent, and will separate the wheat from the chaff." *Austin v. Michigan Chamber of Commerce, supra,* 494 U.S. at 695 (Scalia, J., dissenting). The people are able to evaluate conflicting arguments. *Id.* at 706 (Kennedy, J., dissenting). They can even evaluate anonymous campaign literature. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 349, n. 11 (1995). That is because "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Id.* at 349, n. 11, citing *Abrams v. United States*, 250 U.S. 616, 630 (1919). Surely, if the common, ordinary people of America have such intelligence, the professional politicians elected to public office to represent them also possess

the ability to evaluate arguments and separate truth from fiction--regardless of the speaker's identity or the funds spent to package and disseminate the message.

Only the most compelling of government interests can justify a severe intrusion on the ability of the people to communicate with their representatives, including the freedom to associate and hire assistance. Years ago, this Court upheld the requirement that the Communist Party of the United States register under the Subversive Activities Control Act, because the goverment was "menaced by a world-wide integrated movement which employs every combination of possible means, peaceful and violent, domestic and foreign, overt and clandestine, to destroy the government itself." *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 96 (1961). Unlike the Florida lobbying restrictions, the grave danger posed here is a truly compelling interest that justifies requiring disclosures.

B. Florida's Burdensome Disclosure Requirements Leave People To Speak At Their Own Peril, Risking Retaliation And Gambling On A Favorable Court Ruling In A Later "As Applied" Challenge.

The far-reaching Florida disclosure provisions place the people and their agents in an untenable position. Either they must reveal sensitive information and risk danger to themselves, their employees, and/or their families--particularly if pending legislation is controversial--or ignore the law and hope for a successful court decision in the future. In America today, there are numerous "hot button" issues. Some of the cases cited in the Petition involve pro-life

groups: *Minnesota Citizens Concerned for Life, Inc. v. Kelley,* 427 F.3d 1106 (8th Cir. 2005); *North Carolina Right to Life, Inc. v. Bartlett, supra,* 168 F.3d 705; *North Carolina Right To Life, Inc. v. Leake, supra,* 525 F.3d 274. One case involves gun rights: *Minnesota State Ethical Practices v. Nat'l Rifle Ass'n, supra,* 761 F.2d 509. Cases in past decades have involved heated civil rights topics: *NAACP v. Alabama,* 357 U.S. 449 (1958); *NAACP v. Button,* 371 U.S. 415 (1963). The recent Ninth Circuit case described in Section I involved the battle over defining marriage: *Canyon Ferry Baptist Church v. Unsworth, supra,* 556 F.3d 1021. Passions become inflamed on both sides of such pressing public issues, and mandatory disclosures create unnecessary risks that stifle communication with elected representatives.

Harris minimized the dangers associated with lobbying restrictions, dismissing concerns as "hypothetical borderline situations...conjured up in which such persons choose to remain silent because of fear of possible prosecution" and calling the restraint "at most an indirect one resulting from self-censorship." *United States v. Harriss, supra,* 347 U.S. at 626. But only a year earlier, a concurring Justice of this Court recognized the severe restraint associated with compelling a publisher to register with the government and disclose the identities of persons who purchased his books and other papers. *United States v. Rumely, supra,* 345 U.S. at 57 (Douglas, J., concurring).

"Self-censorship" is no minor concern. It has the earmarks of a prior restraint on speech that the First Amendment cannot tolerate. The Constitution safeguards "at the least the liberty to discuss publicly

and truthfully all matters of public concern *without previous restraint or fear of subsequent punishment.*" *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 775 (1978) (emphasis added). This Court has acknowledged the severe burden and chilling effect of forcing a speaker to risk prosecution--or rely on the vicissitudes of case-by-case litigation--to engage in protected political speech. *Fed. Election Comm'n v. Wisc. Right to Life, Inc., supra,* 127 S.Ct. at 2681; *Virginia v. Hicks, supra,* 539 U.S. at 119. If disclosures truly serve a compelling government interest, it is imperative that they be "narrowly drawn to prevent the supposed evil"--and no more. *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940).

Selective enforcement against unpopular causes is a real danger where statutes burdening the First Amendment are not narrowly tailored. *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring) (it would dangerous to allow public school officials to censor any student speech that interferes with the school's "educational mission"). "A statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however even-handed its terms appear." *NAACP v. Button, supra*, 371 U.S. at 435-436. This is equally true of a statute that deters associations and speech for the purpose of influencing legislation. The First Amendment was designed "to protect unpopular individuals from retaliation--and their ideas from suppression--at the hand of an intolerant society." *McIntyre v. Ohio Elections Commission, supra*, 514 U.S. at 357. Throughout history, persecuted groups have sometimes had to conceal their identities in order to criticize oppressive practices. *ACLU of Nev. v. Heller*, 378 F.3d 979, 981 (9th Cir. 2004) (striking

down statute requiring certain groups or entities publishing any material or information relating to election, candidate, or any question on ballot to reveal publication names). Moreover, both the people and their elected representatives are entitled to have access to protected speech that might be suppressed if it were subject to onerous disclosures.

III. THIS COURT SHOULD GRANT REVIEW TO SAFEGUARD THE FIRST AMENDMENT RIGHTS TO PETITION THE GOVERNMENT AND TO FREELY ASSOCIATE WITH OTHERS.

The First Amendment guarantees an inseparable cluster of rights to free speech, press, association, assembly, and petition for redress of grievances. These are not identical but are closely related and thus "coupled in a single guaranty." *Thomas v. Collins, supra,* 323 U.S. at 530. The Florida disclosure requirements for lobbying activities implicate all of these rights, but particularly burden the rights of petition and association. "The government cannot be trusted to assure, through censorship, the 'fairness' of political debate." *Austin v. Michigan Chamber of Commerce, supra*, 494 U.S. at 679-680 (Scalia, J., dissenting). That central truth of the First Amendment applies to restrictions on the ability of the people to associate and communicate with their elected representatives.

A. The Right To Grassroots Lobbying Is Rooted In The Right To Petition The Government.

The right to petition the government parallels lobbying activities. Justice Jackson's dissenting opinion in *Harriss* recognizes this connection:

> The *First Amendment* forbids Congress to abridge the right of the people "to petition the Government for a redress of grievances." If this right is to have an interpretation consistent with that given to other *First Amendment* rights, it confers a large immunity upon activities of persons, organizations, groups and classes to obtain what they think is due them from government. Of course, their conflicting claims and propaganda are confusing, annoying and at times, no doubt, deceiving and corrupting. But we may not forget that our constitutional system is to allow the greatest freedom of access to Congress, so that the people may press for their selfish interests, with Congress acting as arbiter of their demands and conflicts.
>
> *United States v. Harriss, supra*, 347 U.S. at 635 (Jackson, J., dissenting)

Justice Jackson would have left rewriting of the Lobbying Act to Congress in light of the "delicate and difficult task" of regulating professional lobbying without abridging the constitutional right of petition. *Id.* at 636 (Jackson, J., dissenting).

The right to petition government may not be the subject of many modern cases, but it has ancient roots pre-dating the Constitution, which did not create the right but merely safeguards it against government infringement. *Hague v. CIO*, 307 U.S. 496, 512 (1939). More than a century ago, this Court affirmed it as an essential attribute of citizenship "found wherever civilization exists." *United States v. Cruikshank*, 92 U.S. 542, 551 (1876).

> The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.
>
> *Id.* at 552.

Citizenship in the United States, with its representative system of government, would have little value if it did not embrace the right to discuss legislation and communicate with lawmakers. *Hague v. CIO, supra*, 307 U.S. at 513. "[T]he whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961).

Two cases in this Court in the 1960s examined the right to petition in the context of the Sherman Antitrust Act. In *Noerr*, the complaint alleged that the railroads had used a publicity campaign to restrain trade and monopolize certain freight business. The campaign encouraged the adoption of new laws and law enforcement practices that would harm the trucking business. This Court ruled that the Sherman

Act could not be used to prohibit an association of persons to attempt to influence legislation, even though the proposed new law might produce a monopoly or restrain trade. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra*, 365 U.S. at 136. The Act could not be stretched so as to regulate political activity and encroach on the freedom of petition--it could only regulate business activity. *Id.* at 137-138. In a similar case a few years later, this Court said that:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.
>
> *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965)

Moreover, this Court found the right to petition broad enough to include the distribution of propaganda by third parties in a manner that appears to be the expression of views by independent persons and groups. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra*, 365 U.S. at 140-142. This third-party technique is comparable to the artificially stimulated letter campaigns that *Harriss* swept within the definition of direct lobbying. *United States v. Harriss, supra*, 347 U.S. at 620.

Communication between the people and their legislators is vital to both of them. Lawmakers are deprived of a valuable source of information if the people's speech is stifled. The people have a

corresponding right to communicate with those they have elected to represent them and vote on their behalf.

B. The First Amendment Protects The Right To Associate With Others And Pool Resources For More Effective Communication.

In modern America, association is imperative to facilitate effective lines of communication between citizens and their representatives. Individuals can write letters or make phone calls, but a lone voice is more likely to be drowned out than a well-organized effort by people who share common concerns and unite to express their opinions.

But such efforts inevitably require the assistance of others and a corresponding financial outlay:

> In any economy operated on even the most rudimentary principles of division of labor, effective public communication requires the speaker to make use of the services of others.... Division of labor requires a means of mediating exchange, and in a commercial society, that means is supplied by money.
>
> *McConnell v. FEC, supra*, 540 U.S. at 251, 252 (Scalia, J., dissenting)

The right to spend money and to pool financial resources is crucial to effective free speech in modern America. *Id.* at 252 (Scalia, J., dissenting). This Court recognized that reality when it held that the First

Amendment encompasses the right to use paid petition circulators. *Meyer v. Grant*, 486 U.S. 414 (1988).

The government regulates money in many legitimate ways. There are laws requiring payment of income and other taxes, laws prohibiting bribery, laws against prostitution. However, the Florida lobbying statutes target money used for speech, and that is improper:

> [W]here the government singles out money used to fund speech as its legislative object, it is acting against speech as such, no less than if it had targeted the paper on which a book was printed or the trucks that deliver it to the bookstore.
>
> *McConnell v. FEC, supra*, 540 U.S. at 252 (Scalia, J., dissenting)

In line with that principle, this Court has consistently rejected attempts to selectively tax the press. A state cannot impose a special use tax on the ink and paper used for publications. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). A tax on newspaper advertisements, similarly, violates the First Amendment. *Grosjean v. American Press Co., Inc.*, 297 U.S. 233 (1936).

The lobbyist petitioners in this case utilize many techniques that invoke association rights, including the organization of rallies and demonstrations, communications with association members, and other strategies. Petition, 7. Minnesota regulations upheld in the Eighth Circuit severely chilled communications between the members of a voluntary association by

imposing burdensome disclosures. *Minnesota State Ethical Practices v. Nat'l Rifle Ass'n, supra,* 761 F.2d 509. That case involved the common technique of stimulating a letter-writing campaign to influence legislation on a matter of shared concern among association members. While that method is disparagingly referred to as an "artificially stimulated" campaign, individual speakers are not compelled to participate but merely encouraged and provided with helpful information to make their own views known to public officials.

Well-financed speech may be successful in reaching the ears of public officials and persuading them. But that is no reason to shut down or impose excessive burdens on the exercise of First Amendment rights. *Austin v. Michigan Chamber of Commerce, supra,* 494 U.S. at 705 (Kennedy, J., dissenting). Nor is the source of a speaker's funds relevant to either his right to speak or the right of others--society or legislators--to hear what he has to say. *Id.* at 707 (Kennedy, J., dissenting).

CONCLUSION

This Court would surely affirm the desirability of facilitating political participation by ordinary citizens:

> The Supreme Court decisions thus far with respect to preserving the integrity of the electoral and legislative processes appear to attempt to balance competing interests in such a way as to promote a societal value of increasing the opportunity, effectiveness, and thus the encouragement for participation in the

> democratic process by ordinary citizens vis-a-vis the more wealth or organized "special" interests.
>
> Jack Maskell, *Grassroots Lobbying: Constitutionality of Disclosure Requirements* at 12, (Cong. Research Serv. Jan. 12, 2007) *available at* http://assets.opercrs.com/rpts/RL33794_20070112.pdf

However noble this goal may be, "ordinary citizens" often need to organize and pool resources in order to have a meaningful voice in the complex political machinery of modern America. "Special interest groups" are often associations composed of ordinary citizens who share one or more common concerns. Moreover, "artificially stimulated letter writing campaigns" provide ordinary citizens with the very tools they need for effective expression, including names and contact information for their legislators and opportunities to sign petitions as part of a larger group.

This Court should grant review to halt the troubling trend toward unconstitutional regulation and assure the people of their fundamental rights to speak freely about the issues of the day.

Respectfully Submitted,

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